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COMMERCIAL LAW

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COMMERCIAL LAW

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MUNICIPAL SCHOOL OF COMMERCE

LONGMANS, GREEN, AND CO.
39 PATERNOSTER ROW, LONDON
NEW YORK, BOMBAY, AND CALCUTTA

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PREFACE

ALTHOUGH meant to be of service to business men, this work is written mainly for the student preparing for the various professional and commercial examinations. Prepared from notes of lectures given to classes of young men taking the Accountancy, Banking, and Secretarial courses at the Manchester Municipal School of Commerce—students with no knowledge of law, and with but limited time to enter fully into any particular branch of the subject,—the treatment has necessarily been of an elementary character. That the method adopted in the classes has been on the right lines is evidenced by the numerous distinctions awarded to students of the School in the Law Examinations of various bodies. An important feature of the book is the provision of test questions at the end of each chapter, and the Examination Papers on pp. 277–289 of the principal examining institutions and societies.

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COMMERCIAL LAW

PART I

COMMERCIAL TRANSACTIONS

INTRODUCTION

COMMERCIAL law is that part of the law which applies to the transactions of commercial men, or as they are called, mercantile persons. It determines the legal rights and liabilities of such persons in dealing with mercantile property in mercantile transactions. We may therefore view the three subjects—mercantile persons, mercantile property, and mercantile transactions—as the sum total, when viewed from a legal aspect, of commercial law.

Of course these three parts must of necessity overlap : e.g. a partnership is a group of persons the outcome of a mercantile transaction, namely, the contract of partnership may be treated as a branch of the law of contract or as a branch of the law of persons.

We will treat first with the law of commercial transactions, dealing with the general law of contract briefly, and more fully with the chief commercial contracts of sale and bailment.

CHAPTER I

THE LAW OF CONTRACT

Definition—Agreement—Offer and Acceptance—Acceptance and Revocation—Consideration or Form.

SUPPOSE Mr. Reader makes an appointment with his friend Tom to meet him at the Albion Hotel to dine, and Mr. Reader arranges with the hotel proprietor to provide the meal, and Tom fails to turn up, the dinner must be paid for by Mr. Reader.

Here there are two agreements : (a) that of Tom to dine with Mr. Reader, of course at the latter's expense ; and (b) the agreement with the proprietor of the hotel to provide the dinner and Mr. Reader to pay for it. These two agreements are very similar and yet there are points of difference. The law will have nothing to say as to Tom's breach of faith ; but if Mr. Reader refuse to pay or the landlord fail to provide food, the other party in each case can call upon the law for compensation or performance. Thus we may see that there are some agreements which the law will not enforce and some which the law will enforce. It is these latter which concern us and which are called contracts.

Let us examine (b) in the above. Mr. Reader has the right by law to have supper prepared according to

agreement, the landlord has the right to be paid, and each of them has corresponding liabilities. Again, if X. agree to perform certain work for Y. in return for £20, then each party has rights and liabilities ; viz. Y. has a right that the work shall be done and done to the best of X.'s ability, at the same time he is liable to pay X. for his services ; on the other hand, X. must perform as agreed and has the right (corresponding to Y.'s liability) to receive payment.

Many hundreds of similar illustrations might be cited, and we may from all, as from these two, deduce our definition.

1. We find two persons, one makes an offer, the other accepts that offer in full ; this offer and acceptance is an agreement or expression of common intention.
2. In case of failure to carry out their intention the parties may have recourse to law.
3. Each party has rights and liabilities arising out of the agreement.

Definition.—Hence we can with Sir William Anson define a contract as, “an agreement enforceable at law made between two or more persons by which rights are acquired by one or more parties to the contract to certain acts or forbearances on the part of the other or others ;” or with Sir Frederick Pollock, more shortly as, “an agreement and promise enforceable at law.”

There are some agreements, as in the first example, that is social relationships, e.g. to dine, walk, travel, or dance together, which are not intended to affect legal relationships of the parties and are unenforceable. These are said to be *nudum pactum*, and the maxim *Ex nudo*

pacto non oritur actio applies, i.e. out of a bare promise no action (in law) arises.

AN AGREEMENT NECESSARY, ITS ELEMENTS

Agreement.—In every agreement we can find at least two persons, one (at least) making an offer and another accepting.

The persons may be any of those mentioned elsewhere, i.e. a natural person, or a body of persons, as a partnership, or an artificial or juristic person, e.g. a limited company.

It matters little what the agreement is, if it be legal, however complicated. It can be reduced to a simple question embodying an offer and a simple affirmation accepting that offer, e.g. if iron is offered to X. at 40s. per ton, X. writes asking if delivery may take place over a fortnight at price 40s. net cash. No answer is vouchsafed. X. then writes accepting the offer without restriction and so completes a contract. Notwithstanding the intermediate correspondence this comes to : "Will you buy my goods at my price ?" and X. replies, "Yes !" (see the case of *Stevenson v. McLean*). If X. writes offering a house at £1000 to Y.; Y. says, "No, I will give you £950 ;" X. refuses, but Y. cites original offer, and says he accepts. There is no contract, since Y. cannot accept after refusing or making a counter-proposal which in itself is refusal (*Hyde v. Wrench*).

An offer may be found in advertisements, e.g. offer of a reward, which may be accepted by any person willing to comply with the terms. Such offers are

generally accepted by conduct, and the offeror (person advertising) must pay the reward to the acceptor, e.g. 1. X. loses his dog, and offers 10s. to the person restoring ; Y. finds the dog, restores it, and so accepts the offer of X. ; Y. may demand his reward. 2. A bus or a car plying in the streets is an offer (so long as there is room) to carry parties within certain limits ; I take my seat and so accept, implying a promise to pay. X. has goods priced in his shop, this is an offer ; I enter and ask for certain of these goods ; this is my acceptance and I must pay X.'s price.

Offer and acceptance.—There are certain rules to be observed when making an offer and when completing the contract by acceptance of the offer.

1. Offer and acceptance must be communicated by the parties offering and accepting respectively. This communication may be either by words or conduct, but in no case must silence be taken for consent ; e.g. as in *Felthouse v. Brindley*, if I offer £50 for goods and say that if I hear nothing I shall consider the goods mine at that price, the contract is not complete and the goods may be sold elsewhere.

2. If an offer is made and I accept the offer without reservation, I am bound by all the terms of the offer if I knew of their existence or with reasonable diligence could have discovered them ; e.g. a train goes to Liverpool from Manchester Central at 12.30 p.m. ; I purchase a ticket which on the face of it states that it is issued subject to regulations on the back. I am bound by those regulations, even though I do not make any effort to become acquainted with them. Of course if the regulations are so cross-printed with other matter that they

are obliterated or cannot be read, I shall not be bound by them.

3. We have seen that fulfilling the terms of an advertisement is sufficient to create a binding contract, and we know that advertisements are intended to be an offer to the world at large (*Carlill v. Carbolic Smoke Ball Co.*); *i.e.* the offer is not necessarily made to one person or to any one in particular, but it is not turned into a contract until accepted by a particular person or persons.

4. Our first example showed that obligations created by offer and acceptance of a social character do not create a contract, they must be legal obligations or our definition is departed from.

5. There must be "consensus ad idem" between the offeror and acceptor, *i.e.* both must agree as to the same subject-matter, and the acceptor must accept *all* the terms offered without equivocation or reservation. We must, however, note that simple inquiries not embodying a refusal will not take away the offeree's chance to accept (*Stevenson v. McLean*).

6. No person is liable as on a contract until he accepts the offer; *e.g.* a bill of exchange is drawn on me, I am under no obligation to the payee to accept the contract. On the other hand, the person offering is not bound until acceptance, and he may revoke the offer at any time before acceptance.

Leaving an offer open.—7. Suppose I say that I will sell my piano for £50. I inform X. and tell him that I leave the offer open till Monday. I can revoke the offer before Monday by giving X. notice before he accepts, unless the offer to keep open until Monday was made

subject to a higher price or other advantage agreed to be conferred by X. X. cannot in such a case accept after Monday unless I consent.

Acceptance and revocation of an offer by post.—8. If an offer of goods is made to a person and he posts a letter accepting, he is bound, though the letter is delayed or miscarried in post or even lost, *i.e.* posting completes acceptance; *e.g.* Andrew offers a quantity of cotton to Peter, who accepts, by post, at once. *After Peter has posted his letter Andrew finds the offer disadvantageous and revokes by telegram before receiving Peter's letter. The contract is binding and the revocation void, as Peter has completed although Andrew was unaware of this (Household Fire Ins. Co. v. Grant).*

The rule as to revocation by post is the reverse of this, *i.e.* revocation is not complete until it is received by the offeree. *E.g.* Andrew, as above, offers cotton to Peter and writes a letter revoking his offer on the following morning. Peter telegraphs, before receiving Andrew's letter of revocation but after Andrew has posted it, accepting the offer; the contract is complete and the revocation of no effect.

In short, posting completes an acceptance of an offer, receipt of revocation completes the revocation of an offer (*Byrne v. Van Tienhoven*).

Consideration or form.—There is another element of a contract to be found in the phrase “enforceable at law.” The law demands some evidence of good faith in contracts, and this evidence is to be found either in the form of the contract or in the presence of consideration, *i.e.* the giving of something in return for something, or as it is expressed, a *quid pro quo*.

These alternative necessities give us a classification of contracts.

1. Formal or specialty contracts depending on their form for their validity, namely, contracts which are entered into by a deed, sealed and delivered.

2. Simple contracts depending on consideration for their force. Suppose John Brown says, "I will give you my horse if you will accept." I reply, "I accept." Later, if Brown says that he does not see his way to carry out our mutual intention, can I sue him? Certainly not. I have suffered no loss, given nothing in return, nor have I borne to enforce any right I have against Brown, and therefore the law will not step in unless Brown's promise is in a deed of gift under seal and delivered.

Good consideration.—Consideration is of two classes, good consideration and valuable consideration; the former being the outcome of natural love or affection, is not recognized in commercial contracts, the latter is recognized and necessary in all contracts not made by deed.

Valuable consideration.—Valuable consideration is defined as something of value in the eye of the law, e.g. marriage in return for a settlement of property and the reverse, or money or money's worth. Sir W. Anson defines it as: "Some right, interest, profit, or benefit accruing to the promisor, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the promisee," i.e. any benefit conferred upon a man in return for something, or any disadvantage suffered in return for something, is valuable consideration.

Reality of consideration.—1. One must be able to see that the consideration has a money value and that it is something which a man is not otherwise bound to

perform : *e.g.* a tenant cannot say, "I will pay my rent, which is due, provided you see that the drains are in good condition." Payment of money already due is not consideration for any promise to repair. A debtor cannot complain if his creditor breaks a promise not to sue for a certain time, unless he has given consideration for the promise.

2. A promise of a small sum to discharge a large one is not a good consideration, although, as a rule, the law does not look at the value of consideration. The reason that £90 will not satisfy a debt of £100 is plain. I owe £100 and pay £90 in cash, receiving a receipt as for payment in full. A new agreement is thus made, *i.e.* that my creditor will excuse payment of £10, but what have I given him or suffered for him in return? Nothing. Very well, then, he may still sue me for £10, there being no consideration given by me to bind the contract to forego his right to the £10. Had I given a cheque, a bill of exchange, an old chair, or anything else in return, the receipt would be good as against my creditor. Again, if the receipt is a deed under seal the discharge is good, as the form takes the place of consideration. On the other hand, if something different in nature is given, a debt may be discharged ; *e.g.* goods worth £20 may discharge a debt of £30, or a cheque, or bill, or note for £25 may be good discharge of a greater debt, since these instruments *may* be of greater value to the creditor than payment in full, in cash.

3. Consideration may be (1) Present, or (2) Future, but not (3) Past, *i.e.* it may be executed now or it may be executory. We will now see what is the meaning of these terms.

EXAMPLES

Present.—1. I have goods for sale. X. enters my shop and takes goods, promising to pay. My consideration is executed; X.'s consideration to me is executory.

Future.—2. I say to X., "I will give you £5 if you find my dog." X. tries to find the dog but fails. My consideration of £5 is executory, X.'s implied promise to devote his time to the finding of the dog is executory. If X. does not find the dog I cannot sue him, for his consideration has failed, and the only thing he held out to me was a hope of success. On the other hand, I do not pay him, for he has not found the dog, and my promise was conditional on the finding.

Executory consideration is found in promises. Executed consideration is found in acts or fulfilled promises.

3. If I ask a builder to put up a greenhouse and he does so, he expects payment. *The consideration* which he has *executed at my request* is the building of the greenhouse.

Past.—4. A. sells a horse to B., who finds it a very good one. B. is pleased, and tells A. that he will never buy from any one else. A. sues B. because B. buys a horse from C. A. fails because he gives no consideration, or at least the consideration (the first transaction) is past.

5. X. saves Y.'s goods from destruction. Y. afterwards promises X. a good position, which promise he fails to keep. X. has no claim, the consideration being past.

QUESTIONS

1. Define and give examples of contracts.
2. State the essentials of a contract.
3. State the difference between the acceptance and the revocation of an offer by post.
4. What is meant by enforceable at law in regard to contracts?
5. Distinguish between simple and specialty contracts.
6. What is meant by valuable consideration? Give examples.

CHAPTER II

CLASSES OF CONTRACT

Classification of Contracts—Estoppel—Statutes of Limitations—
Simple Contracts—Written Contracts—Statute of Frauds.

Classes of contract.—English law has various classes of contract—

1. Express contract, where the terms of the contract are expressly stated either verbally or in writing.
2. Implied contract, where the existence of a contract is implied either by the conduct of one or both parties, *e.g.* I do certain services for B. with B.'s knowledge and implied consent. I am entitled to look to B. for payment.
3. Transactions into which the law introduces the elements of contract, *e.g.* (a) judgments of a court of record which are termed contracts of record. When judgment is given it is entered on the court rolls, and the law implies that the judgment debtor has promised his judgment creditor that he will pay.

(b) When accounts are stated between X. and Y. the one owing a balance is by the fact of the statement represented as promising to pay the balance.

(c) If A. has been by compulsion of law forced to pay money legally payable by B., A. may recover on a

promise implied by law that B. shall refund the money (e.g. landlord's property tax).

This last class (3) are not really contracts, but are closely allied in their legal effects to contracts, hence they are termed quasi-contracts.

Another and perhaps better classification is into—

1. Contracts of record which have been viewed above.

2. Specialty contracts in a deed under seal.

3. Simple contracts.

A deed.—Specialty contracts are contained in deeds which are printed or written on paper or parchment and are sealed and delivered. It is usual also to sign and have the signature attested by witnesses.

The seal is now only a wafer, and the act of sealing is done by formally placing the finger on the wafer. Delivery often takes place at the same time by using the words, "I deliver this my act and deed."

Once sealed and delivered unconditionally, the deed becomes operative and remains so until discharged by execution or termination of the contract. But if delivered conditionally to a third party the deed may be inoperative until the condition is performed, the deed is then said to be delivered as an "*Escrow*;" which means that it is delivered on a condition and only becomes fully operative when the condition is fulfilled.

Differs from a simple contract.—A promise under seal may be enforced even if gratuitous, i.e. no consideration is required, but if consideration exists it must be truly stated and it must be legal and moral.

EstoppeL—Everything in a deed is conclusive against the parties, and they cannot deny their own

"act and deed," i.e. they are *estopped* from denying their deeds.

Limitation.—Rights of action on a deed do not lapse after six years as in a simple contract, but if connected with land they are barred after twelve years, if otherwise, after twenty years, under the Statutes of Limitation.

Some contracts necessarily under seal.—At common law a corporation could not enter into any contract unless evidenced by the seal that it was the will of the whole body. This restriction has been varied a little, and as commerce has advanced the rigour of the rule has been mitigated, hence there are several exceptions to the rule that "a corporation can only contract under its seal."

1. Where the corporation is a trading corporation, e.g. a limited liability company, and the very ends of the company would be defeated by this rule, it is abrogated: e.g. under the Companies Act, 1862, bills may be drawn, signed by a person authorized by the company in the company's name, and they do not require sealing.

2. Cases of small moment, e.g. hiring labourers.

3. Cases of urgent necessity.

Simple contracts.—Any contract not under seal or by way of record is a simple contract, which may or may not be in writing. Every simple contract may be put into writing, but there are certain contracts which though not required to be by deed are at least required to be in writing by law. This does not give sufficient formality to dispense with consideration, and absence of writing does not in general make such contract void, but only

unenforceable on account of absence of evidence required by law.

Written contracts.—The following contracts must be in writing :—

1. Those contained in a bill, note, or cheque, *e.g.* the acceptance of a bill, the order to pay on demand in a cheque.

2. Guarantees.

3. Agreements made as the consideration for marriage, *e.g.* X. will marry Y. and Y. shall settle certain property on X.

4. Contracts for the sale of lands.

5. Agreements not to be performed within the space of one year from their making.

Contract 1 is required to be in writing by the Bills of Exchange Act, 1882, and contracts 2 to 5 are to be in writing by sect. 4, Statute of Frauds (29 Chas. II. c. 3). Such contracts not in writing are not void but simply unenforceable.

6. The Stamp Act, 1891, provides that policies of insurance shall be in writing.

7. Acknowledgment and promise to pay a statute-barred debt must be in writing signed by the debtor or his authorized agent by sect. 13, Mercantile Law Amendment Act.

8. Special, reasonable contracts limiting the liability of a railway company as a common carrier (*q.v.*) must be in writing, signed by the person delivering goods for carriage under sect. 7, Railways and Canals Traffic Act, 1854.

9. Sale of goods (*q.v.*) of a value of £10 or upwards must, as one of three alternatives, be evidenced in writing.

10. Agreements for the loan of money to a person engaged or about to engage in business on the terms that the lender shall receive a share of the profits by way of interest without thereby becoming liable as a partner (Partnership Act, 1890, sect. 2).

SECT. 4, STATUTE OF FRAUDS, 29 CHAS. II. C. 3

Without actually giving the whole section, the statute provides that the following contracts are not enforceable unless in writing signed by the party to be charged or his agent.

1. The special promise of an executor or administrator to answer damages out of his own estate.

An executor, of course, is never personally liable for his testator's debts or liabilities, unless he has agreed to make himself so, nor can he make himself so on any consideration except the agreement be set out as above, *i.e.* in writing and signed.

2. The special promise to answer for the debt, default, or miscarriage of another person (*see* Guarantee).

3. Agreements made in consideration of marriage.

4. Contracts for the sale of lands, tenements, and hereditaments, or any contracts entering into or concerning them.

5. Agreements not to be performed within the space of one year from the making thereof.

The memorandum required by the section and also that required by sect. 4, Sale of Goods Act, 1893, is necessary, not to form the contract but as proof of the existence of the contract. Contracts can be performed

and are valid even if not complying with the Statutes, presuming them to be in other respects legal, the point being that the law will not step in to enforce a contract not so evidenced, in case of dispute.

To be good the memorandum must show: (*a*) the parties to the agreement, either naming or describing them; (*b*) the material terms of the contract; (*c*) the consideration (except the exemption of a guarantee under sect. 3 of the Mercantile Law Amendment Act, 1856); (*d*) the signature of the party to be charged or his agent.

The signature may be a mark, or initials, it may be printed, or stamped, and it may appear anywhere provided it governs the whole document. It has been held that the printed name on the heading of notepaper is sufficient, and probably a business card may be (*Evans v. Hoare*, 1892, 1 Q. B.). It must be in existence at the commencement of the action, although not of necessity made when the contract was arranged. The note may exist in several documents provided they are connected, consistent, and complete. Connection must appear in the papers themselves, and cannot be obtained or established by other evidence. The note is not necessarily one sent to the other party, e.g. an affidavit in Chancery proceedings on a different matter is good as a memorandum of any agreement contained in it if it be signed as required.

Broker's bought and sold notes, signed and delivered by him on behalf of his principal, constitute the memorandum of the original contract, and should be identical.

The Statute of Frauds is never raised by the court itself, but must be pleaded as a defence, or the plaintiff

may recover even in absence of writing, *i.e.* it is a weapon of defence and not offence.

It would seem that the return of a contract note endorsed, "We are sorry to say we cannot accept this contract, as there has been a clerical error in the price," is a sufficient memorandum (decision of Judge Parry, Manchester County Court, 1905, following *Buxton v. Rust*, L. R. 7 Ex. 279).

Oral Contracts.—Most of the contracts in English commercial life are oral ones. Nearly all our everyday purchases are by simple, oral contract. Any of these might be put into writing, but there is no necessity to do so, they are just as binding in law as the written ones; except in the special cases previously mentioned.

QUESTIONS

7. Give instances of the various classes of contracts.
8. What is meant by "escrow" and "estoppel"?
9. State the periods under which rights of action on contract are barred by the Statute of Limitations?
10. Name the contracts that must be in writing.
11. What contracts are not enforceable under the Statute of Frauds, unless in writing signed by the person to be charged or his agent?
12. State the essentials of the memorandum required as proof of the existence of the contract.

CHAPTER III

CAPACITY TO CONTRACT

Aliens — Corporations — Infants — Lunatics — Drunkenness — Married Women.

Capacity to contract.—Capacity to contract is not a question of the same vital importance that it was previous to 1882, in which year an important Act dealing with the liability of married women was passed. The law as to an infant's contracts is much the same, but the capacity of a married woman is greatly extended.

Aliens.—*Prima facie* every person of full age and in possession of a sane mind may contract and sue on the contract unless otherwise disqualified by law, *e.g.* barristers cannot sue for fees. The contracting party has status in our English courts whether he be alien or British subject. If he be an alien, he must, in order to retain his standing, be the subject of a government at peace with our country, *i.e.* an alien enemy has no standing in the courts of our country. Hence contracts between an Englishman and an alien are suspended on the outbreak of war between England and the alien's country, and the relationship cannot continue without licence from the contracting parties' governments, *e.g.*

partnership is in such case *ipso facto* dissolved by war (*Griswold v. Waddington*).

Corporations.—The rights and duties of a corporate body, as set forth in its documents of association, or in its enabling statute or charter, govern the authority and capacity of such juristic person to enter into contracts.

Infants.—Infants or minors are in law all persons under the age of twenty-one years. The only contracts on which such person can be held liable are contracts for necessities and contracts such as contracts of employment, apprenticeship, and others which are, in the opinion of the court, of advantage or benefit to the infant in his future life and business.

Under no circumstance is an infant liable for the price of goods not necessary, or for loans, or bets of any description. Further, an infant can incur no liability on a cheque, or note, or bill, or guarantee. Of course nothing can interfere with the infant's own wish to pay, but he cannot be forced to pay. His incapacity cannot be said to extend to incapacity to give a discharge on a cheque. An infant may have a banking account, and the banker is quite safe in paying his cheques and acting in the ordinary course of business, but he would be unwise in allowing him to overdraw, as an overdraft is a loan and cannot be recovered. An infant's contracts for loans or goods not necessaries—*e.g.* cigars—cannot be enforced even if he represents himself as of full age, but this will not release him from liability in tort, *i.e.* for fraud.

Necessaries.—An infant can make himself liable on a contract for necessities. What are necessities is a question of fact in each case. Necessaries “are such

articles as are necessary not only to support a person in life, but such as are required by a person to uphold his position in life and are in keeping with his state and condition." Luxuries are not always necessaries, but in some cases they are. A public school outfit would be necessary for an Eton boy, but not for an average working-man's child. So jewellery might be necessary for a student, the son of wealthy parents, but not for the man who holds a scholarship at a university and has no other means.

The question as to what are necessaries is decided by the judge and jury. The judge decides whether under any circumstances certain things can be deemed necessaries, and the jury decides whether in the case under consideration they were necessary; *e.g.* the judge may say that a purse is a necessary, and the jury decide whether the value of the purse is in proportion to the infant's circumstances in life, and whether he was also well supplied with necessaries of the kind in question.

Void and Voidable.—Some contracts of an infant are void, *i.e.* destitute of any legal effect, and some are voidable, *i.e.* may or may not be affirmed by him. Contracts of loan, accounts stated (*q.v.*), or sale are void, and hence of no effect as against the infant; but there are agreements which can be enforced by the infant against the other party but not by the other party against the infant; *e.g.* agreements to take shares in a company. Such a contract can be enforced against an infant after he has attained his majority without repudiation if he takes advantage of it, *e.g.* accepts dividends. Otherwise the attaining of twenty-one is immaterial, as by the Infants' Relief Act, 1874, the power of ratification was

taken away. *E.g.* D. gives a promissory note to X. for money supplied to D., an infant. On attaining 21, D. ratifies the note or even gives another for it; the new contract or note is not enforceable against D.

Lunatics.—The rule as to the contracts of a lunatic is that, like the contracts of a sane person, they are *prima facie* perfectly valid. If, however, the other contracting party is aware of the state of the lunatic's mind, the contract is voidable at the option of the lunatic himself during a sane interval, or of the person appointed by the Court as his personal representative, who is called his "committee."

Necessaries.—A contract for supply of necessities is always good, and the price can be recovered from the lunatic's estate.

Contracts made during intervals of sanity are perfectly good, and if insanity occurs after the formation of the contract this does not affect the contract unless it be one in which a fiduciary relationship exists between the parties; *e.g.* the Partnership Act, 1890, provides for the termination of the contract of partnership; the authority of an agent terminates with the insanity of his principal.

Drunkenness.—Drunkenness has a similar effect on contracts as insanity has; *i.e.* if the party contracting with a person who is intoxicated is aware of his condition, the contract is voidable at the option of the intoxicated person when he recovers his senses.

Married women.—Before 1882, or at least before 1870, as a general rule it was true that a married woman's contract was void. Of course even at this time there were exceptions, as instance the following:—

1. She might contract to render personal services, in which case she could sue as plaintiff, joined with her husband.

2. She was capable in law of having an assignment of choses-in-action made to her; *e.g.* she could hold a bill of exchange, although she could not enforce the contracts contained in it, but her husband might "reduce it into possession" during his lifetime.

3. The king's consort could sue and be sued on a contract as if a *feme sole*.

4. By "custom of the City of London" a married woman was capable of trading, and she could contract in that trade, and, provided her husband were joined, she could sue on such contracts.

Statutory powers.—The Married Women's Property Act of 1870 gave a married woman certain privileges and made certain classes of property her separate estate. She was enabled to sue for wages and earnings, and such money earned or adjudged to her was her own. She sued for it in her own name, but could not be sued without her husband being joined with her.

The Act of 1870 was repealed by the Act of 1882, which, together with the Married Women's Property Amending Act of 1893, still contains the law as to married women's property. The object of these Acts was to make a woman a separate person from her husband in law, capable of acquiring, holding, and disposing of property either by contract or will.

Every woman marrying after January 1, 1883, is entitled to hold in her own name all property which she possesses at marriage or becomes possessed of after marriage. Even a woman married before the Act may

hold for her separate use any property coming to her after the above date, provided the title to it accrued before that.

A married woman is now capable of entering into and making herself liable on any contract to the extent of her separate property. She may sue and be sued alone on such contracts, but she cannot be rendered personally liable. She is only liable to the amount of any separate estate that she may have and which she is not restrained from anticipating.

By the Act of 1893 a contract of a married woman binds all her separate property to which she is entitled at the time of contracting, and all property which she may afterwards be entitled to.

QUESTIONS

13. What is the position of an alien in regard to his capacity to contract?
14. What is the liability of an infant in regard to contracts?
15. How is the decision arrived at in regard to the necessaries of an infant?
16. What agreements can be enforced by an infant against another party?
17. State the rule as to the contracts of a lunatic, and in case of drunkenness.
18. What is the position of a married woman in regard to property and liability under contracts?

CHAPTER IV

FLAWS IN A CONTRACT

Void, Voidable, Unenforceable Contracts—Coercion—Undue Influence—Fraud—Misrepresentation—*Uberrima Fide*—Confirmation or Rescission—Mistake—Impossibility—Illegal.

A CONTRACT which, on the face of it, is complete and within the definition, may be vitiated by some hidden defects.

Void, voidable, unenforceable.—The flaw may be entirely fatal, in which case the contract is void and no liability can be incurred on it. It may be so tainted that one party may either repudiate it or elect to stand by it, it is then said to be voidable. Or it may be perfectly good, both parties being morally bound, yet the contract still be unenforceable on account of not complying with the law, e.g. memorandum to satisfy the fourth section of the Statute of Frauds not being forthcoming.

The chief defects which may occur in a contract arise from the following causes :—

1. Coercion or duress.
2. Undue influence.
3. Fraud.
4. Misrepresentation.
5. Mistake.
6. Impossibility.
7. Illegality.
8. Nonconformity to statutory provisions.
9. Want of capacity.

The first three of the above heads might be classed

under the head of fraud ; and, in fact, in the Courts of Equity they would be deemed fraud, which, according to equity lawyers, includes every "act, omission, or concealment involving breach of trust or confidence, or the taking of an undue or unconscientious advantage by one person over another."

Coercion.—1. Coercion, or duress, consists of any violence, either threatened or actual, exerted upon another party or upon a party's wife or child with intent to bring that party to an agreement. It is just as bad if done by an agent as by the principal.

The effect of duress destroys the right of the guilty person to sue on the contract, and the other party may repudiate the contract if by his conduct he is not estopped from denying it ; *i.e.* the contract is *voidable*, but must be avoided as soon as the restraint is withdrawn or reasonably soon after.

Undue influence.—2. Undue influence arises in all cases where power is acquired and detrimentally exercised by one person over another. It is often pleaded in cases where a fiduciary relationship exists between the parties, *e.g.* promoters of a company and companies promoted, parent and child, solicitor and client, principal and agent, partners, or trustees and beneficiaries.

Presumed.—A solicitor cannot purchase from his client, nor a medical man from his patient, without the presumption of undue influence being raised. But apart from this presumption, undue influence may be proved to exist, and the onus of proof is on the party impeaching the transaction. Undue influence really means in this sense, some unfair or unconscientious use of the

power arising out of the circumstances of the parties, *i.e.* compulsion of such a kind as in law will make a contract voidable at the option of the person influenced. Unlike duress it must be exerted on the will of the other contracting party. The age of the person on whom the influence is brought to bear, *i.e.* whether immature or advanced, is a great factor in such cases, and although the courts will not as a rule enter into inadequacy of consideration, that in itself may be evidence of undue influence.

Fraud.—3. Fraud has the effect of making a contract voidable at the option of the person suffering from the fraud.

The contract may either be set aside or affirmed, but in either case the party complaining has his remedy in an "action of deceit," to recover damages for the loss sustained in consequence of his acting on the false representation of the other party. The plaintiff must prove that the statement was made fraudulently or dishonestly, *i.e.* he must show that he has been induced to act on a false representation of a material fact, such as would be instrumental in influencing the judgment of a reasonable man. It must have been made with a view to bring about the contract, and it must actually have that effect. Lastly, it must have been made either: (1) with a knowledge that it is false; (2) without any belief in its truth; or (3) recklessly without caring whether it be true or false.

False statement made honestly.—If the statement be made honestly, even though it be false and even though carelessness has been evidenced, the facts will not support an "action of deceit."

In *Derry v. Peek*, 14 A. C. 337, a special Act of Parliament had given a tramway company power to use animal power and, with consent of the Board of Trade, steam power as a means of traction. A prospectus was issued stating *inter alia* that the company could use steam power by its special Act but not mentioning the condition. The Board of Trade withheld their consent, the company being unsuccessful and was wound up. Shares had been taken on the strength of this assertion in the prospectus, and an "action of deceit" was brought but failed, inasmuch as the statements were made in honest belief in their truth. This case gives us the general law on this topic, but such a decision would not now be given in cases of representations in a prospectus turning out to be false, however honest, unless they were extracts from expert reports or Government documents. The Directors' Liability Act, 1890, altered the law as to misrepresentations honestly made by directors, otherwise the ruling in *Derry v. Peek* is still in force.

Misrepresentation.—4. Any false statement made honestly or innocently by a party before or at the time of making a contract will not be sufficient to support an action for damages unless it amounts to a warranty, but the party deceived may set aside the contract or have it rescinded.

Mere non-disclosure in an ordinary contract does not vitiate it, e.g. if B. says to me, "I believe that to be an original Vandyck, will you take £20 for it?" I may accept his offer, even though I know that he is under a misapprehension, so long as I do not by words or conduct convey to him any suggestion that he is correct. If, however, B. knows nothing of these

matters, and I knowingly represent my painting to be by Vandyck, I may be liable in an action of deceit. Again, if I have come across the picture at a sale, and think it is a Vandyck, and represent it as such innocently to B., B. may have the contract set aside without damages if we can be put into our original positions.

Uberrimæ fidei.—There are some contracts, however, that from their nature require that the utmost good faith be used on both sides *in the making*. This class of contracts are said to be contracts "*uberrimæ fidei*," or contracts in good faith. The class includes, contracts of insurance, contracts for sale of lands, contracts to take shares in a company, and according to Sir Frederick Pollock, contracts of partnership and possibly suretyship. These latter rather require the good faith and full disclosures *after* the formation and during continuance and not at the making, therein differing from real contracts "*uberrimæ fidei*."

In such cases as contracts of insurance, frauds or actionable misrepresentation may consist of not only a false suggestion, but also of a suppression of the true state of things; or, as it is put, a misrepresentation may consist not only of a "*suggestio falsi*" but also of a "*suppressio veri*."

Affirmation or rescission.—Contracts tainted with fraud and misrepresentation are not void but voidable, *i.e.* valid until rescinded at the option of the complaining party, who may affirm the contract either expressly or impliedly, or rescind the contract at his option.

We must note that rescission cannot take place after (1) the party complaining has taken any benefit under the contract after he knew of the defect, *e.g.* accepted

dividends on shares after the fact of the fraud in the prospectus or their issue has been brought to his knowledge ; (2) the rights of innocent third parties for value have intervened, *e.g.* a man cannot claim to have a contract to take shares set aside after winding-up proceedings have commenced, and the rights of creditors against him and other contributories have accrued ; (3) the subject-matter of the contract has been dealt with so that the parties cannot be reinstated in their former positions. He must rescind within a reasonable time after he knows the true facts, or the right to rescind is lost.

Mistake.—5. Mistake of fact may have a disastrous effect on a contract, *i.e.* it renders it void *in toto* if it affects it at all. No relief is given if the mistake is one of law, so that money paid under compulsion of law cannot be reclaimed or recovered if the complaining party discovers that it was not necessary for him to pay. Closely allied to this, but not exactly under this head, comes the case of a party paying a debt, but not being able to produce evidence of payment is by law forced to pay again, if the claimant is acting *bona fide*. He cannot recover the money so paid if he afterwards produces evidence that it was already paid, *i.e.* finds his lost receipt. Usually, however, money paid under a mistake of fact can be recovered (*Durrant v. Eccles. Commissioners*, 6 Q. B. D.).

So also on a contract based on misapprehension of facts by both parties (*Cochrane v. Willis*, L. R. 1 Ch.).

A mistake may be a fundamental mistake, *i.e.* it may go to the root of the transaction. To avoid the transaction the mistake must be mutual. A person cannot

say, "I made a mistake and did not know you meant such a thing, even though you said it."

Mistake as to the party with whom one is contracting is in many cases fatal, especially if the contract is one in which credit is given or personal character is an essential point in the agreement. Such a mistake may amount to fraud, in which case the contract is still void, as in *Cundy v. Lindsay*, where A. representing himself as B. prevailed upon C. to deal with him.

Mistake as to the subject-matter of a contract avoids the contract in a similar way, e.g. in the well-known case, where X. agreed to buy cotton from Y. ex. *Peerless* from Bombay. There were two ships *Peerless* from Bombay, X. meant one and Y. meant the other; it was held that there was no contract.

Mistake may be made in reducing the contract to writing, and although it is the rule of the common law that a written contract cannot be varied or added to by verbal evidence, yet in a Court of Equity the parties may have their instrument rectified at the suit of one of them, if he can bring evidence as to the original intention of both, and to show that the original intention is not expressed in the writing. In such cases the contract is not avoided, but can be enforced as rectified.

Impossibility.—6. Impossibility, mistake, and fraud may be coincident; impossibility may arise out of what is called a fundamental mistake, and such mistake may be the result of fraud on the part of one party.

Impossibility renders the contract void "*ab initio*" in cases where it has any effect at all.

General rule.—The general rule in English law is that a person entering into a contract, the terms of

which he could have qualified, will not be excused performance by something happening subsequently to render performance impossible, *e.g.* if a man takes premises on a lease at a rent, he is bound to pay that rent throughout the term, even if the premises, on account of fire and the like, cease to exist, unless he makes some reservation in his agreement. Similarly if a man unconditionally contracts to complete a certain work in a certain time, he is bound by his contract, even though weather or other conditions intervene to hinder the work ; and if liquidated damages are stipulated for in case of non-completion, these may be recovered subject to the opinion of the court as to penalties and damages (*q.v.*).

Void contracts—Exceptions.—The exceptions to the general rule are cases in which (1) the carrying out of the contract is impossible owing to the consideration being unreal or impossible, *e.g.* to ride to the moon, etc., which is physically impossible, or to contract out of statutory powers given to the tenant for life by the Settled Lands Act, 1882, which is legally impossible. (2) Under the Sale of Goods Act, 1893, sect. 6, where there is a contract for the sale of specific goods, and these goods have (without the seller's knowledge) been destroyed previous to the contract, such contract is void "*ab initio*," *e.g.* A. sells a cargo of cotton to B. ; unknown to A. the cargo was lost a day or so before the contract was made ; the loss falls on A. and not on B., since in law there never was a contract, and property in goods never passed to the purchaser, despite any rule to the contrary (*see* Sale of Goods as to when property passes).

3. Impossibility caused by an "Act of God" avoids a contract. Act of God for this purpose means some natural phenomenon, sudden and of such force that it could not be prevented or under any circumstances have been foreseen.

4. The same effect is obtained in a case where an Act of Parliament is passed which makes an act hitherto quite legal, impossible on account of a new illegality by force of the statute. The reverse case is also possible, as where a covenant is given that certain acts shall not be done, and this is followed by an enabling statute allowing the acts to be done.

5. When an event is to happen subject to which a contract exists, and the event is outside the power of either party, if the contract fails on account of the non-happening of this event, the parties are excused performance but the contract is not void "*ab initio*," and, therefore, the parties are left in the position in which they were on the failure of the event; e.g. if tickets are sold to view a race, and the race does not take place on account of the death of a competitor, the contract is discharged, and if the ticket-sellers are strangers to the race arrangements, no money can be recovered from them in respect of any tickets they may have sold.

6. If the contract is one in which personal services are to be rendered, illness or death discharges the contract, and in the latter case the representatives of the deceased are of course discharged; e.g. A. agrees to sing at a concert for B., A. is unable to keep his appointment on account of a severe cold. B. has no action against A., nor has C., a ticket-holder, an action against B. for breach of contract; nor in any case has C. an

action against A., there being no privity of contract between A. and C.

Illegality.—7. Illegality voids a contract; in fact, there can be no contract in case of illegality either of object or of consideration. Illegality of object may be present even when the contract is on the face of it entirely good; *e.g.* a loan may be perfectly good on the face of it, but if to further an illegal object it will be void. In such case knowledge of illegality is necessary, or at least knowledge of the object for which the loan is required, which is presumptive evidence of knowledge of illegality. Illegality of consideration is evident on the face of the contract, *e.g.* A. offers B. £50 to assault C. The consideration is illegal and the contract is void. If the £50 had been paid it could not be recovered, nor could the person paying it claim the assistance of a court of law. But it may be recovered if the purpose is not wholly carried out. And it may certainly be recovered from a stakeholder if notice of revocation of his authority to hand it over be given him.

Classes of illegal contracts.—Certain acts are illegal by common law on account of their transgression of ordinary morals, or being against public policy. Other acts were in themselves perfectly good, but by an Act of Parliament are now deemed to be wrong, and are thereby declared to be illegal.

Mala in se.—(1) Illegal at common law. (a) In restraint of trade. If a person contracts with another that the former shall not carry on a certain business, and that contract is not reasonable, it will be void as being in restraint of trade. If the contract is reasonable the court will uphold it (*Nordenfeldt v. Maxim*

Nordenfeldt) ; but even if the agreement is in a deed (in which, as a rule, consideration is not required), the consideration must be *present* and *expressed*. Many of such contracts are made as a result of an indenture of apprenticeship, or a dissolution of partnership.

(b) Fraudulent preference of creditors, immoral contracts, contracts to commit a crime, or other wrong are void apart from statutory enactment, as are agreements to stifle a prosecution or to encourage unnecessary actions in a court of law.

Mala prohibita.—(2) Illegal by Statute. (a) Contracts made on Sunday are, as a rule, void by an Act of Parliament passed in the reign of Charles II. (Sunday Observance Act). Such contracts are void if made by a tradesman or workman in his ordinary business, but not if made outside his usual occupation.

(b) Insurance policies taken out by persons having no insurable interest in the thing or event which is insured against, are void as being in the nature of bets. Such are insurances on the lives of other persons, the insurer not being a creditor of and not interested in the life of the insured.

(c) Policies of insurance not in writing are void by the Stamp Act.

(d) Under the Gaming Acts of 1845 to 1892, contracts in the nature of wagers are void. The effect of these acts commercially is the prohibition of stock exchange transactions taking the form of payment of differences, in which contracts neither party ever expects that either stocks or goods, as the case may be, shall change hands, but that the difference in prices at the current rate and the next settling day shall be paid by

the one or the other. Such a contract is void even if the parties have the option to actually perform the contract as it appears on the face of it.

(e) Under Leeman's Act it is illegal to deal in bank shares, unless the numbers by which they are known in the books of the company are stated in the contract.

(f) Certain statutes are passed applying to certain persons, who are by those statutes prohibited from contracting out of the rights and liabilities gained and incurred under them; e.g. 1. Settled Lands Acts; 2. Companies Acts, companies cannot contract out of their statutory powers of altering their memorandum, etc.

QUESTIONS

19. Distinguish between void, voidable, and unenforceable contracts.

20. Mention the chief defects which may occur in a contract.

21. State the effect of fraud on a contract, and the remedy in such an event.

22. Discuss the general rule and exception in regard to a false statement made honestly.

23. Instance contracts *uberrimæ fidei*.

24. Mention cases where rescission cannot take place.

25. What is the effect of a mistake in the making of a contract?

26. Give instances of voidable contracts owing to impossibility.

27. Give instances of illegal contracts.

CHAPTER V

THE TERMINATION OR DISCHARGE OF A CONTRACT

Performance—Tender—Accord and Satisfaction—Agreement—Condition—Rules—Breach of Contract—Effect of Lapse of Time—Operation of Law.

WHEN a contract is discharged, the parties to it are either wholly freed from further rights or liabilities under the contract, or they are left with other remedies arising out of the contract; the contract itself being entirely ended.

There are various ways in which a contract may be discharged.

1. Performance of the contract, including payment, and a valid tender of payment in cases of debt, and tender of goods in sale or agreements for hire, and generally, accord with satisfaction.

2. By agreement : (a) novation ; (b) to rescind by an agreement that the contract be no longer binding, such an agreement being supported by consideration ; (c) to release by deed after breach.

3. By breach.

4. By lapse of time.

5. By operation of law, e.g. (a) merger, (b) bankruptcy, (c) alteration of a written agreement, without consent of all parties.

I. PERFORMANCE

This is the most natural way of terminating contractual relations. Performance is the carrying to completion of the promise or act of one party, and the rendering up of the consideration agreed on by the other party.

The best example of performance is payment, which should be made according to the terms of the contract. It should be in legal tender, but may, by request or custom, be by cheque, bill, or note, when it is in reality accord (agreement of the parties that payment be by cheque) and satisfaction (payment by cheque).

Legal tender.—Legal tender is bronze coins of the realm to one shilling in value, silver coins to forty shillings, gold and Bank of England notes to any amount.

Tender.—In case of debts tender must be the exact amount of the debt or of the amount admitted to be due, or if more no change must be demanded. It must be legal tender as above defined, and offer of a cheque is not good, unless no objection on that ground be taken by the creditor. Offer of a cheque to an agent is not good tender, unless he has his principal's permission to accept such.

Tender of goods to operate, must be the identical goods bargained for. Legal tender of goods discharges the contract, and the party tendering can resist or bring an action on the contract. Tender of money does not wholly discharge the contract, but it forms a good defence in an action for debt. The party so tendering must remain willing and ready to pay, and in the event

of the tender being raised as a defence, he must pay the sum tendered into court. The effect of a tender so provided, is to discharge the party from any liability as to costs.

Accord and satisfaction.—Accord and satisfaction is another method of performance.

If X. agrees to pay to Y. £20 for certain work, and then finds himself unable to pay, he may agree with Y. that Y. shall accept a piano and £5 to satisfy the promise to pay £20. This new agreement is called accord. It does not by itself discharge the contract, and until it is carried out the original contract is good. But if X. hands over the piano and £5, the accord is satisfied and the contract discharged. Accord is an agreement that the consideration be varied, and satisfaction is the rendering of the new consideration.

Payment of a smaller sum is not accord for the discharge of a larger sum, as there is no consideration for the foregoing of the difference; in the example, the piano and £5 may be more than £20 or less, but accord is present. A cheque for a less sum may be accord and satisfaction of a larger sum.

2. AGREEMENT—NOVATION

When a new party is substituted for one of the original parties to a contract, by agreement of all concerned, the liability of the parties on the old contract is discharged, and new liability is cast on the parties to the "novated" contract. This is called "novation," and is common where a person buys the business of another, taking over the debts and liabilities with the consent of the creditors. Novation may be brought about by implied

consent or conduct, as where a customer or creditor of a partnership firm goes on dealing with the firm after a change in its constitution has come to his notice.

Revision.—Revision is by an express contract entered into, that the old agreement shall be no longer binding.

Condition.—A contract may come to an end by the occurrence of an event operating as a condition subsequent, i.e. a condition stating that, on the happening of a given event, the contracting parties shall be discharged.

Release.—If a party fails to carry out his portion of the contract, the other party may elect not to proceed with his remedies ; but if he do so elect, the first party cannot bind him to his election, unless consideration is present, when the discharge is by accord and satisfaction. On the other hand, the release may be by deed which from its form is binding on the person executing it.

3. BREACH OF CONTRACT

Every breach of a contract by one of the parties entitles the other to bring an action claiming damages ; but every breach will not entitle repudiation on the part of the other party.

Whether or no a party is exonerated under the contract by a breach on part of the other contracting party, depends on the importance of the clause which is broken. The test is, "Was the broken term vital and necessary to the contract ?" i.e. was it a *condition* of the contract ? If the answer is positive, the aggrieved party may treat the contract as at an end. On the other hand,

any matter which is collateral to the main object of the agreement cannot be a condition, but is termed a *warranty*. Breach of such collateral term is not sufficient to excuse performance on the part of the other party, but he must always be allowed a right of action for damages or loss sustained.

Sometimes a contract itself provides as to damages to be paid on breach. If a sum of money is stipulated for, as being payable on breach of the contract, the common law courts would originally have allowed payment under all circumstances ; but in Equity, and now in any division of the High Court of Justice, the question arises whether such payment is a penalty intended to secure performance, or is only liquidated damages, i.e. the calculated amount which is fixed beforehand by the parties as the probable damage in case of breach. In the former case of *penalty*, the whole sum may not be recoverable, but only the actual loss sustained by breach, and in case the sum is held to be *liquidated damages*, the full amount so provided for is recoverable.

The words used by the parties are not conclusive. As in the case of *Elphinstone v. Monkland Iron Co.*, 11 A. C. 382, a railway company agreed to pay a *penalty* of £100 per acre, with interest, if certain slag-hills were not levelled on a certain day, this sum was held to be "liquidated damages" ; whilst in *Kemble v. Farren*, 31 R. R. 366, a sum of £1000, stated to be treated as *liquidated damages*, was held to be a *penalty* and not recoverable, the jury estimating plaintiff's loss at £750.

The best rules to follow in ascertaining the question, are—

1. Where the sum to be paid is for a certain matter,

and the sum named is greater than the value of the matter, the sum so named is a penalty, e.g. the penal sum in a common money bond.

2. If the sum is to be paid on breach of a term in the contract, uncertain in value but important, the sum so named will be construed as liquidated damages.

3. Where the same sum is to be paid on breach of all or any of the terms of a contract, all of which vary in value, the sum will be regarded as a penalty, as in *Kemble v. Farren*.

To return to the question of condition and warranty, the Sale of Goods Act, 1893, provides that whether a stipulation is a condition, breach of which entitles a party to repudiate, or a warranty entitling a party to an action for damages, but not to a right to reject the goods, depends in each case on the construction of the contract, which in case of dispute is decided by the judge.

REMEDIES

Remedies in case of breach of contract may be sought in the Courts of Law or in Equity, or rather in the various divisions of the High Court of Justice.

Damages given in a common law court are assessed by a jury acting in accordance with the following rules which are laid down by the judge :—

i. Damages must be assessed at the amount of difference between position (pecuniarily) of plaintiff on breach, and what would have been his position if the breach had not occurred ; i.e. plaintiff is to be put into that position in which performance of the contract would have placed him.

2. Damages must be given only for the natural and direct loss ensuing from breach, and no damages can be given for loss which could not possibly have been contemplated by either party.

3. Damages are said to be for compensation, not by way of punishment. There is perhaps one exception in the case of moral damages given on breach of promise of marriage.

Specific performance is the appropriate remedy in Equity, but it will not be meted out if the remedy of damages is appropriate; i.e. if damages could not compensate, specific performance may be claimed.

Specific performance means the turning of an executory contract into an executed one by order of a court of law, i.e. giving to the complaining party the actual thing contracted for.

Any division of the High Court may give this equitable remedy.

The Court will not interfere unless it can superintend the execution of the decree (*Powell, etc., Coal Co. v. Taff Vale Railway Co.*, 9 Ch. A. 331).

In this case the Court would not enforce the performance of continuous acts on part of the company, viz. the working of points and signals.

Contracts of a purely personal character are not enforced (*Lumley v. Wagner*, and *Whitwood Chemical Co. v. Hardman*, 1891, 2 Ch. 416).

Contracts for sale of goods are seldom enforced unless special value is attached to the articles, over their market value, on account of their being unique. Contracts for sale of stocks are never enforced by specific performance, unless they are limited in quantity, e.g.

in railway companies, or are not obtainable by the purchaser.

4. THE EFFECT OF LAPSE OF TIME

Under the Statute of Limitations, 1623 (21 Jac. I. c. 16), any action on a claim arising out of a simple contract must be brought within six years; and under the Civil Procedure Act, 1833, actions arising out of specialty contracts, unless creating a charge on land, must be brought within twenty years; the latter class of actions, *i.e.* on contracts creating a charge on land together with judgments creating similar charges, are to be brought within twelve years, by virtue of the Real Property Limitation Act.

In case of contracts the statutes run from the time of breach, or from the time at which a right of action arose, unless there was existing at that time a disability on the part of the plaintiff to sue, *e.g.* that he was an infant, or the defendant was out of the jurisdiction of the Court. The statutes in these cases run from the time of removal of the disability, and the return of the defendant respectively.

A right so limited is said to be statute barred, and the limitation can be removed or the period renewed in various ways.

Let us suppose the right claimed by the plaintiff is the payment of a money debt, and the defendant has failed to pay, and so broken his side of the agreement. If no action is taken and the claim lies dormant for six years after the breach, the plaintiff has no further right. But (1) a part payment or payment on account of the

principal, or (2) payment of interest, will take the matter out of the statute, and another period of six years begins to run from the date of such payment. An acknowledgment of the debt may revive the right of action, but such acknowledgment must admit the debt and imply a promise to pay, or expressly state that the debtor intends to pay. Such acknowledgment must by the Statute of Frauds Amendment Act be in writing and signed by the party to be charged or his agent.

To bring a case out of the statute if arising out of a specialty contract, no promise to pay is required, an acknowledgment is sufficient.

The Statutes of Limitation simply bar the remedy but do not extinguish the debt. The rights of the parties to the contract are still existent and can be enforced circuitously ; e.g. a creditor may retain goods of his debtor which properly come into his hands until a statute-barred debt is paid ; or a creditor may appropriate a general payment not specifically appropriated by his debtor to payment of similar debts.

5. OPERATION OF LAW

If a party takes a security of a higher nature in place of a simple contract, then, provided the simple contract and the higher security are for the same matter, the simple contract is merged or sunk into the higher security. If X. owes £40 to Y., and Y. takes a bond under seal from X., the remedy on simple contract is extinguished and replaced by the remedy on the bond. Again, if Y. had brought his action on simple contract for payment of £40, and had recovered judgment, further

action on simple contract is barred, as the debt is merged in the judgment.

Under the Bankruptcy Act, 1883, an order of discharge by a proper court operates as a release at law from practically every debt or liability provable in bankruptcy.

If any contract of a specialty nature—*i.e.* deed—is altered in a material part by interlineation, erasure, or addition, it is voided and absolutely discharged. The same applies to any contract put into writing. As to alteration of bills of exchange, the sixty-fourth section of the Bills of Exchange Act, 1882, provides:—

(a) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is discharged except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers. Provided that, where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour.

(b) In particular the following alterations are material, viz. any alteration of the date, the sum payable, the time of payment, the place of payment, and where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.

QUESTIONS

28. State the various ways in which a contract may be discharged.

29. State the essentials of a good tender.

30. Explain the meaning of novation.
31. Discuss the rights and liabilities of the parties on a breach of contract.
32. Mention the rules in regard to the assessment of damages on a breach of contract.
33. State the effect of the Statute of Limitations in regard to actions on a contract.
34. What is meant by merger?
35. What effect follows from the material alteration of a deed ?
What are material alterations ?

CHAPTER VI

SPECIAL CONTRACTS

Consideration—Time—Property in the Buyer—Title—Sale of Goods and Factors' Acts—Lien and Stoppage *in transitu*—Transit—Limited Right of Re-sale—Warranty of Title—Implied Warranties—Warranty and Condition—Warranty of Quality—Description—Sample—Acceptance—Receipt—Earnest—Part Payment—Memorandum.

SALE OF GOODS

HAVING outlined the general law of contract, we are now in a position to deal specifically with some of the special contracts of everyday commercial life.

Contracts resulting in change of possession.—We will first treat of the chief contracts known to English Law, whereby possession and ownership of property are transferred. The difference between possession and ownership will be examined later.

The two chief classes of contract effecting the above purpose are contracts for the sale of goods and contracts of bailment.

Sale of goods.—The law as to the sale of goods has been codified in the Sale of Goods Act, 1893, which defines such a contract as “A contract in which one party, called the seller, transfers or agrees to transfer the property in certain goods to another party, called

the buyer, for a *money* consideration to be paid to the seller."

Consideration.—The consideration is called the price, and if any other thing is given instead of money the contract becomes exchange or barter, and not sale.

On examination of the above definition we find the words, "transfers or agrees to transfer," hence we see that a contract of sale may be carried out at once—*i.e.* it may be a bargain and sale completed, or as it is called a "sale" simply, or it may be an agreement to sell at some future date. Bargain and sale or transfer is an example of a contract executed by seller, agreement to sell or transfer is an example of an executory contract which the seller agrees to execute. This latter class includes agreements to be performed in the future, or subject to a condition. Such contracts become executed at the expiration of the time, if any, allotted, or on the fulfilment of the condition, subject to which the contract takes effect.

Time.—The question of time is important as it decides the question as to ownership—*i.e.* it decides when risk of loss will pass to the buyer. The chief rule is that apart from any agreement to the contrary the risk remains with the seller until the property in the goods is transferred to the buyer, when the risk passes over.

Property in goods is deemed to be transferred to the buyer according to the following rules, even though delivery has not yet been made :—

Property in the buyer.—I. Where there is an unconditional contract for the sale of goods already in a deliverable state, these goods being specific in character,

the property passes to the buyer when the contract is made and the price fixed, notwithstanding any agreement as to credit or delivery in the future.

2. Where the vendor has to complete the goods or put them in a deliverable state, the property passes and with it the risk, when the necessary work is done and notice of the completion is given to the buyer.

3. Where the contract is for ascertained goods in a deliverable state, but the vendor is required to weigh, measure, test, or otherwise act to ascertain the price, the property passes when the price is ascertained and communicated to the buyer.

4. Where the contract is for the sale of unascertained or future goods, by description, the property passes when the goods are unconditionally appropriated to the contract by either party, subject to the other's consent; e.g. delivery to a carrier for transmission to the buyer is such appropriation.

5. When goods are sent "on approval" or "on sale or return," the property passes when the buyer so acts as to adopt the transaction. Retention of the goods beyond a specified date without either accepting or refusing, or keeping an unreasonable time, embraces "approval."

Title.—With regard to transfer of property another rule holds, namely, that where goods are sold by a non-owner not having authority from the true owner, property in the goods does not pass to the buyer unless the owner by his conduct is precluded or "estopped" from denying the seller's authority. This rule is embodied in the well-known maxim of English law, *Nemo dat quod non habet*, i.e. "No one can give that which he

has not." A thief, therefore, can give no title to stolen goods.

The estoppel above mentioned is generally grounded on the rules laid down in the Factors Act, 1889, and the Sale of Goods Act, 1893.

Sale of Goods and Factors Acts.—By these Acts the authority of mercantile agents and others having possession of goods with the owner's authority is somewhat enlarged. Although similar in effect, the later Act does not repeal the earlier one, so that the Acts must be read together. The important sections enact as follows:—

1. Where a mercantile agent is with the *consent* of the true owner in possession of goods or documents of title to goods (such as a bill of lading, dock warrant, warehouseman's certificate, warrant, or order for delivery, or any other document used in the ordinary course of business as a proof of the possession or control of goods), any sale, pledge, or disposition for value made by him, is as valid as if expressly authorized by the true owner, provided the person taking under the sale, pledge, or disposition, acts in good faith, and has no notice of want of authority.

2. Where a person has sold goods and continues in possession of them or documents of title to them, delivery of the goods or transfer of such documents, by the person in possession, by way of sale, pledge, or other disposition, will have the same effect as if the person selling, pledging, or otherwise disposing had full authority, provided the receiver act in good faith and without notice of want of authority.

3. Where a buyer or person agreeing to buy goods obtains possession of the goods or documents of title to

goods with the seller's consent, delivery or transfer by the buyer to a third party of the goods or documents, under a contract of sale, pledge, etc., will have the same effect as if the person so delivering were agent of the original seller.

These three rules have not destroyed the rule as to a purchase in market overt (*q.v.*). It will be seen that in each case the person disposing of the goods or documents of title, is in possession with the *consent* of the rightful owner.

The party taking under any disposition as noticed above, takes any risk which may be present on account of the person disposing having found the goods, or stolen them, or having obtained possession by fraud amounting to larceny, as in *Cundy v. Lindsay*, 3 Ap. C. 459, or otherwise than by the owner's true consent.

If the consent to possession has been obtained under a voidable contract the disposition is nevertheless binding, since a voidable contract cannot be avoided if the rights of third parties for value have intervened. Therefore a consent obtained by fraud (not larceny) is within the meaning of the phrase "true consent," since contracts granted by fraud are not as a rule totally void.

The consideration given to the person disposing under the above rules (in the case of a pledge) cannot be a pre-existing liability, since sect. 4 of the Factors Act provides that "where a mercantile agent pledges goods as security (or sect. 3, documents of title to goods) for a debt or liability already due, the pledgee shall acquire no other right than the pledgor had at the time of pledging." Hence a banker is not protected by the

Factors Act if he takes documents of title from a mercantile agent to secure an advance already made.

Lien and stoppage in transitu.—The seller of goods, notwithstanding the fact that the property in the goods has passed to the buyer, has by implication of law: (a) a limited right of re-sale; (b) a lien on the goods or a right to retain them so long as he is in possession and the price is not paid, subject, of course, during solvency to any contract as to credit; (c) in case of insolvency of the buyer, notwithstanding any contract as to credit, the seller has a right of "stoppage in transitu," even after parting with possession, *i.e.* he has a right to resume possession so long as the goods are in transit, and to retain them until payment or tender of the price.

This right of retainer is not *prima facie* affected by sale by the buyer, but sect. 16 of the Factors Act, and sect. 47, Sale of Goods Act, alter the law somewhat in the case of transfers by means of bills of lading. The change in the latter enactment is as follows:—

Sect. 47, Sale of Goods Act.—"Where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes it in good faith and for value, then, if such last-mentioned transfer is by way of sale, the unpaid seller's lien and right of stoppage *in transitu* are defeated; and if that last-mentioned transfer is by way of pledge or other disposition for value, the unpaid seller's rights can only be exercised subject to the rights of the transferee taking under the pledge."

Where a bill of lading is transferred out and out, the transferee by sect. 1, Bills of Lading Act, 1855,

becomes liable on every contract contained therein ; but if by way of pledge to secure a loan, these liabilities do not attach, as the pledgee is not an absolute owner.

Care must be taken to distinguish between lien and stoppage in transit. Lien arises while the seller has possession so long as he is unpaid, and (1) in absence of an agreement as to credit ; (2) if the term of credit has expired ; or (3) where the buyer is insolvent even though credit is given. Stoppage in transit may be exercised even in case of sale on credit, but only in the case of insolvency, *i.e.* when the buyer cannot pay his debts when due. Insolvency does not necessarily mean bankruptcy.

Lien is lost by delivery of goods to a carrier for transmission to the buyer, without expressly reserving the right of disposal, or by allowing the buyer or his agent to be in lawful possession. Lien is not lost simply because the contract of sale is merged in the judgment obtained by the seller against the buyer in an action to recover the price.

Transit.—Goods are in transit until the buyer or his agent takes delivery. If the buyer choose that the goods be carried to a further destination by the same carrier, the transit has ended when the goods arrive at the destination intended by the seller and come into the possession of the buyer, and from that time the carrier is bailee for the buyer. If goods be rejected by the buyer, transit is deemed to continue until retaking by the seller or acceptance of delivery by the buyer or his agent. Part delivery may or may not end the transit ; if such part delivery implies an agreement to deliver the whole, the right of stoppage is lost, but if such is

not implied, the right exists as against the undelivered portion ; *e.g.* right attaches to each instalment in course of transit if delivery is by instalments, but if the right is not exercised say, before any coal of an order of one ton is delivered, it cannot be exercised after the delivery note is given up to the buyer, and part of the coal removed from the vehicle carrying it and transferred into the buyer's cellar.

If the carrier is agent of the seller, the holding of the carrier is the holding of the seller, and whilst the right of stoppage *in transitu* does not attach, the agent can exercise the right of lien on behalf of his principal.

Limited right of re-sale.—The contract is not rescinded by the exercise of the seller's right of lien or stoppage, but the seller sometimes does and may of right sell the goods to another, *e.g.* where the goods are perishable and the price is not paid, or after notice of intention "to re-sell in default of payment" has been given, the seller may re-sell and recover from the original buyer damages to cover his loss if any.

Warranty of title.—Subject to what has already been said, none but the owner of goods can give a title unless by sale in "market overt." "Market overt" shortly means every shop in the "City of London" in which goods are exposed for sale, as to those goods the owner usually trades in. In the country market overt includes all customary fairs and markets or markets held under crown grant. If a person selling as usual in such place, disposes by way of sale of goods which have been stolen, the buyer gets a good title, which can only be defeated by prosecution of the thief to conviction.

The law was formerly the same as to goods, the

title to which was tainted with fraud not amounting to larceny ; but now by sect. 24 of the Sale of Goods Act, the title of a purchaser of goods in market overt is not defeated on the punishment of a person guilty of fraud with respect to the goods, although even in such a case the Court still has a discretionary power to order restitution to the rightful owner.

Horses.—Special statutory provision is made as to the sale of horses, by two Acts of Parliament, 2 Philip and Mary, c. 7, and 31 Elizabeth, c. 12, which give rights to the true owner, not existing in the case of other goods, notwithstanding sale in open market. Even if horses be bought in open market, the sale must be conducted with certain formalities or it will not be conclusive, *e.g.* the horse must be exposed for sale during one hour, between 10 a.m. and sunset, in a public fair or market.

Implied warranties.—Certain warranties are implied as to title, unless the contract be such as points to the contrary, as for instance, a sale of goods seized by a sheriff's officer or a distress by a landlord, in which case the person selling does not impliedly warrant the title. The warranties are—

1. In every contract of sale, the seller implies that he has the right to sell, or if the agreement be executory, he implies that he will have that right at the time when the contract is to be executed.

2. The buyer shall have quiet possession, *i.e.* shall not be ousted by the seller or persons claiming through him.

3. The goods sold are free from encumbrances not already known to the buyer, *e.g.* no undisclosed bill of sale attaches.

Warranty and condition.—When certain representations are made as to the goods in a contract of sale, in order to bring about the contract, such representations may amount either to conditions or they may be warranties.

A warranty is a stipulation, with reference to the subject of the contract, but collateral to the main purposes of the contract. Breach of a warranty will not give a valid reason for treating the contract as at an end, but will only give cause of action to recover damages for loss arising from the breach.

A condition is a similar stipulation, but it is vital to the contract, or as it is said, it is "of the essence of the contract." Failure to carry out a condition not only gives the buyer the right to treat the contract as ended, and to hold himself discharged from any liability on the contract, but it also gives him a right of action for damages. Conditions in contracts of all kinds may be of two classes : 1. Condition precedent subject to the performance of which the existence of the contract depends ; e.g. if I go to London I agree to perform a service for X. in consideration of a certain sum of money. The "going to London" is a condition precedent, and no liability attaches to me on the contract unless "I go to London." 2. Condition subsequent subject to the happening of which the contracting parties liabilities may be discharged or fixed after the commencement of performance ; e.g. in a lease the condition "that a certain class of property shall not be built, and if it is built the lease shall terminate," is a condition subsequent.

Warranty of quality.—The primary rule in English

law as to warranty of quality is that no such warranty is implied, this is expressed in the maxim, *Caveat emptor*, meaning, "Let the buyer beware." This means that in the absence of any statement by the seller the purchaser uses his own judgment in the purchase of the article and is bound to pay for it, although it may not be what he thought it was. Notwithstanding this rule there are, however, several cases in which an implied warranty as to quality is given, namely :—

1. When the buyer, trusting in the skill of the seller, makes known the purpose for which the goods are required, and in supplying such goods the seller is acting in the ordinary course of business, then the goods are impliedly warranted as reasonably fit to fulfil the purpose.

Description.—2. Where goods are bought by description from a dealer in such goods, the seller impliedly warrants the goods to be of a merchantable quality. If in such case there is any defect which could be discovered on examination by the buyer, and he has had a chance to examine, such defect is excused and the seller is not liable.

Sample.—3. Where the sale is by sample then three conditions are implied: (a) The bulk of the goods must correspond to the sample. (b) The buyer shall have an opportunity to compare the bulk with the sample. (c) The goods shall be free from hidden defects making them unmerchantable.

Description and sample.—4. When goods are sold by sample and description, the goods must correspond with the description as well as with the sample.

Sale of Goods Act, sect. 4.—Certain formalities are

required for the sale of goods of certain values before such sales can be enforced. The law on this point is laid down in the Sale of Goods Act, 1893, sect. 4, which is as follows :—

“ 1. A contract for the sale of any goods of the value of £10 or upwards, shall not be enforceable by action, unless the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum, in writing, of the contract be made and signed by the party to be charged or his agent in that behalf.”

“ 2. The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit, or ready for delivery, or some act may be requisite for the making or completion thereof or rendering the same fit for delivery.”

“ 3. There is an acceptance of the goods within the meaning of this section, when the buyer does any act with respect to the goods which recognizes a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not.”

Examining the section we find that sales of goods of the value of £10 or upwards, are not invalid by reason of non-compliance with the section, but that they are simply unenforceable by action, that is, they may otherwise be quite good, but the courts will aid neither one party nor the other.

Signature by both parties to a contract of sale is not necessary, but the only party to be sued is the one

who signs either personally or by his agent; hence if X. and Y. enter into a contract, X. to sell £20 worth of goods to Y., and Y. to buy the same, and Y. signs an agreement to that effect, then X. may sue Y. on the contract by producing the signed agreement, but Y. cannot sue X. unless X. or his agent signs. Such would be a case where want of mutuality did not affect the matter.

In order to comply with the statute there are three alternatives, observance of any one being sufficient.

Acceptance.—I. Acceptance and actual receipt. Acceptance as used in this sense is not the meaning usually accepted. Its meaning is defined in the third subsection of sect. 4, which as we have seen says that acceptance such as will bind a purchaser to pay for goods is not required, that is, acceptance to satisfy the Sale of Goods Act, sect. 4, need not be acceptance in fulfilment of the contract. There may be acceptance in this sense terminating in rejection of the goods: e.g. X. agrees to buy a thousand cigars from Y., the cigars to be according to sample. Y. forwards cigars in execution of the contract, X. receives them, compares with the sample, and returns them as not corresponding with the sample in bulk. The comparing with sample and examination by X. is evidence of a pre-existing contract, and is an acceptance within the meaning of sect. 4, even though the goods are rejected.

Receipt.—Receipt and acceptance are different and either may exist without the other, but both must exist to conform with the statute. Receipt may be evidence of intention to accept but it is not acceptance.

Receipt is exemplified when the buyer takes a portion

of goods. It may be by an agent and even by change in the possession of a third party without the goods changing hands ; *e.g.* if A. holds goods of B., and B. sells these goods to C., on A. assenting to hold for C., C. has by his bailee A. "actually received the same."

Acceptance and receipt are not conclusive proofs of a contract, they are evidence of the existence of a contract.

Earnest.—2. The second alternative is the giving of earnest or part payment. Earnest is the giving of something, money or goods or securities, to bind the bargain. Part payment is the giving of money as part of the price, and as price is not paid until the contract is concluded, part payment is not made to bind the bargain, but it is evidence of the existence of the contract. Earnest is not as a rule part of the price.

Part payment.—Part payment may be a debt due from the seller to be set off against the price, provided the agreement to set off is apart from, or collateral to, the contract and not part of the contract of sale ; *e.g.* X. owes £20 to Y., Y. agrees to buy goods from X., stipulating that the £20 owing by X. shall be set off against the price payable by Y. This is not sufficient part payment within the statute, but if *after* the contract X. and Y. agree that the debt owed by X. shall reduce the price, the set off is sufficient part payment within the statute.

Note or memorandum.—3. The third and last alternative is that some "note or memorandum" of the contract shall be in existence, "signed by the party to be charged or his agent." Such a note must contain all necessary terms of the contract, namely, the parties, named or

described ; a description of the goods in respect of which the contract is made ; the price, if fixed ; and any other express condition—*e.g.* as to quality. This note may be contained in one or several documents, *e.g.* a correspondence, but the letters must be connected in themselves and no other evidence can be allowed to connect them. An envelope containing the note may be sufficient evidence to show that the person to whom it is addressed is a party to the contract.

Signature.—The signature may be anywhere in the document provided that it governs the whole of the contents, as for example, it may be a printed name on a memorandum form. It may be in print, in ink, or in pencil ; it may be a mark, stamp, or initials, and still be a signature within the Act. Any want of signature in the contract itself may be supplied by a subsequent letter referring to or acknowledging the contract. It is not necessary that such evidence exist at the making, but the note must exist at the time of commencing the action. A letter repudiating a contract has been accepted as sufficient evidence of the existence of a contract.

QUESTIONS

36. Define the contract of a sale of goods.
37. State the rules in regard to the passing of property in the goods to a buyer.
38. Discuss the position of possession of "goods on approval."
39. State the rule in regard to the sale of goods by a non-owner.
40. State briefly the position of mercantile agents under the Sale of Goods and Factors Acts.
41. What is meant by a seller's right of stoppage *in transitu* ?
42. Distinguish between lien and stoppage *in transitu*.
43. Give instances of the loss of lien.

44. Discuss the continuance and end of *transitu*.
45. What is meant by limited right of a re-sale?
46. Explain the meaning of market overt.
47. State the statutory provision in regard to the sale of horses.
48. What is a warranty? Give examples.
49. Distinguish between breach of a warranty and breach of a condition in their effect on a contract.
50. What is meant by *caveat emptor*, and state exceptions to the rule?
51. State the formalities laid down in the Sale of Goods Act in regard to the contract for the sale of goods of the value of £10 and upwards.
52. What is meant by acceptance and receipt?
53. Define earnest.
54. What is meant by note or memorandum, and what particulars must it contain?
55. What will be accepted as evidence of signature?

CHAPTER VII

BAILMENTS

Definition—Classes—Liability of Bailees—Carriage of Goods—Rights and Duties of Carriers—Liability for Valuables—Restriction of Liability—Railway Companies as Carriers—Carriage by Sea—Property in British Ships.

Definition.—The next class of contracts whereby possession is changed, is the class known in law as "bailments," *e.g.* carriage, pledge, letting and hiring.

A bailment means a delivery of goods by a person called the bailor, to another called the bailee, with the intention that they shall be kept, used, or worked upon by the bailee, and at the conclusion of such period of use, the *identical* goods shall be returned to the bailor, or dealt with according to his direction.

Classes.—Bailments may be divided according to the right of the bailor to demand re-delivery, or the absence of that right.

Bailor no right to possess.—1. The bailee may possess, and the bailor have no right to oust the bailee, without first discharging some liability or allowing the bailee to complete his contract ; as, for example, in the contract of pledge, if X. pledges his watch to Y., Y. as bailee has the right to possess even against X. until X. pays the

loan for which the watch is security. Similarly in hire, the owner cannot terminate the hiring until the contract is ended, by efflux of time or by some default on the part of the hirer.

Bailor's right to possess.—2. In the second class the bailee is in possession, but the bailor may demand redelivery and oust the bailee at any time ; as, for example, if X. lends his watch to Y., gratuitously, X. may at any time demand a return of the watch, i.e. Y. holds subject to the bailment coming to an end at the instance of X. without any act to be done by X. beyond making the request for its return.

Second classification.—A more exact and perhaps better classification, is that laid down in the leading case of *Coggs v. Bernard*, viz., the six classes, (1) deposit for safe keeping without reward ; (2) hiring without reward ; (3) letting out goods to be worked upon gratuitously ; (4) hiring for reward ; (5) letting out goods to be worked upon for reward ; (6) pledge of goods. These six classes are set out below under the headings by which they are known to lawyers.

Depositum.—1. Deposit is the bailment in which goods are left by the bailor with the bailee for safe keeping, the bailee receiving no reward ; e.g. a banker often takes jewels of his customer and puts them into his strong room, without taking anything for his services.

Commodatum.—2. Hiring without reward, or, as it is called, *commodatum*, in which the bailee takes goods for use from the bailor, but pays nothing for the use, e.g. where a man borrows a book from a friend.

Mandatum.—3. *Mandatum*, in which no reward is paid, the bailee takes goods, to be worked upon or

carried, *e.g.* where a friend gratuitously carries my goods from one place to another at my request.

Locatio rei.—4. Letting and hiring for reward is not a gratuitous bailment, but it is a contract in which the bailor lets goods out to the bailee for his use, *e.g.* decorations let out for a festive occasion, or furniture is let at a rent.

Locatio operis faciendi.—5. This is the letting out of goods to be worked upon for reward. Contracts of carriage and for the repair or alteration of goods come under this head, *e.g.* goods sent by rail, a watch taken to a watchmaker to be cleaned, or furniture to a cabinet-maker to be repaired.

Vadium.—6. Pledge, or pawn, is the last class. In this goods are deposited with the bailee, as security for money lent by him to the bailor, *e.g.* ordinary pawn with a pawnbroker, deposit of documents of title with a banker to secure an overdraft.

Liability of bailees.—Apart from special cases which we shall deal with separately (*e.g.* carriage by common carriers, pawn to pawnbrokers, and the rights and liabilities of innkeepers), the liability of the bailee depends on the class of the bailment.

For reward.—1. Bailments for reward, or for the mutual benefit of the bailor and the bailee, only carry a liability on the bailee, if loss is occasioned by such want of care on his part as no reasonably prudent man would show in his own affairs.

Gratuitous.—2. Gratuitous bailments may be divided into two classes. (a) Where the bailment is for the bailor's benefit only; and (b) where the bailment is for the bailee's benefit only. In the first case he is liable

only for gross negligence ; in the latter for merely slight negligence.

These standards of negligence are not really recognized in English Law, the general standard in each case being "reasonableness." In the opinion of many eminent English lawyers in a bailment for mutual benefit, the bailee is not liable for loss through robbery or accident unless he has contributed to the loss. Of course the terms of a contract often determine the parties' liabilities ; but we must note that bailments for the benefit of one party only are not contracts unless evidenced by a deed, sealed and delivered ; that is, an action cannot be brought on a promise to enter on a gratuitous bailment, but if the promisor set about it he becomes liable for gross negligence. If the bailee by virtue of exercising a public calling, e.g. common carrier, is in the position of an insurer of the goods bailed, the general rule is altered. Although a bailee working on goods gratuitously is only liable for gross negligence, he is bound to use what skill he has in the work ; he is not bound to do the work, but if he elect to do it, he must do it to the best of his ability. This is expressed by saying that a gratuitous bailee is liable for a *malfaisance*, but not for a *non-feasance* ; e.g. if X. undertake to carry my goods gratuitously, he is not bound to do so, but if he does it, he must not negligently injure the goods.

SPECIAL BAILMENTS**CARRIAGE OF GOODS**

Carriers.—There are two classes of carriers. (1) Private carriers, (2) public, general or common carriers. The first class of carriers does not profess to carry the goods of all men as a general business. They are bailees for reward, and their liability is not affected by custom or statute, hence we may pass over this class to the common carrier, who furnishes us with both common law and statutory exceptions.

Definition.—A common carrier is a person or corporate body, undertaking for reward to carry by land or sea, the goods of all persons who will employ him, the carriage being between certain points and by a certain route. Railway companies are common carriers as to goods which they usually profess to carry, and so are shipowners trading regularly between certain ports, and carrying the goods of all comers by general ship. They must be distinguished from shipowners carrying specific cargoes, who are not common carriers.

By virtue of the position of trust occupied by common carriers, and the advantage of holding goods of other parties without giving security, there is a rule founded upon public policy, that they shall be in the position of insurers, and hence be liable for all loss to goods. There are, however, some few exceptions to this rule, and a common carrier is not responsible for any loss occasioned by (a) an act of God, or "vis major;" (b) the

king's enemies ; (c) negligence of the consignor of the goods, *e.g.* imperfect packing ; (d) inherent vice in the thing carried, *e.g.* low flash oils or vicious animals.

Act of God.—Act of God is defined in *Nugent v. Smith*, 1 C. P. D. 423, as a direct, violent, sudden and irresistible act of nature, the effect of which could not have been foreseen, or under the circumstances prevented, *e.g.* an earthquake. Thus an ordinary storm is not within the definition, and if an animal carried on a ship in such a storm be injured, the carrier is liable apart from negligence. If, however, the animal is naturally vicious and injures itself, the inherent vice would excuse the carrier if negligence is absent.

Rights and duties.—A carrier has thrust upon him by law various duties. He is bound to receive and to carry the goods of any person willing to pay the rate of carriage, provided the goods be such as he is accustomed to carry, he has room in his vehicle, and the destination of the goods is within the limits of his usual journey. He is, as previously stated, an insurer of goods, and he must use all diligence to deliver them safely and without delay. In return for this duty the carrier has a lien on the goods carried by him for payment of anything due on them for freight, *i.e.* he may hold or retain the goods as against the owner, until payment or tender of what is due for carriage or freight.

Carriers Act, 1830, as to valuables.—By the Carriers Act, 1830, which applies to all common carriers by land (including canal and railway companies), no carrier is now liable for loss of or damage to watches, jewellery, precious stones or metals, deeds, securities, works of art, and articles of a like nature, occupying a small space

and being valuable, if the value of the parcel is over £10, unless the consignor states the nature and value of the consignment and pays an increased charge, according to a rate set out in a prominent notice in the carrier's office.

Restriction of liability.—This statutory limitation of the common law liability, is the only restriction which a carrier may make by notice. He may, however, by special contract, avoid some liability, but in this a railway or canal company is restricted.

Railway and Canal Traffic Act, 1854.—By the Railway and Canal Traffic Act, 1854, sect. 7, such special contract is not available as a defence in an action for damage to or loss of goods, unless (1) it is signed by the person delivering the goods for carriage, and (2) it is in the opinion of the Court just and reasonable. Counter privileges are granted in the same Act, to mitigate the rigour of the common law, and railway and canal carriers will not be responsible for loss or injury to any horse which they carry beyond £50, neat cattle, £15, and any pig and sheep, £2, unless a higher value be declared and an increased rate of carriage paid.

Carriers of goods not passengers.—Railway companies are only common carriers of goods and not of passengers. Hence they can make any terms they like for carriage of passengers, and they are not liable for injury to passengers, if they are able to show that all possible care was taken, and that negligence was absent. If in an accident X. is damaged, and luggage of X. is destroyed, the railway company is not answerable for the personal injuries in the absence of negligence, but it is liable for damage to X.'s luggage as a common

carrier, even in absence of negligence ; e.g. in the case of *Readhead v. Midland Railway Co.*, the accident was due to a latent defect in an axle, and presumption of negligence was rebutted, no damages being allowed for personal injuries, but damages were allowed for loss of luggage, it being goods carried by the company in their capacity as common carriers. A railway company's liability extends from the time when the company's servant takes over the control of the luggage (presuming him to be authorized for that purpose), provided the time is not unduly long before the departure of the train, until re-delivery into the care of the passenger or his servant at the end of the journey. So that if a porter carries luggage to a waiting vehicle, the transit is not at an end until he deposits it in the vehicle, and the company is liable for all loss in transit except when contributed to by the passenger.

No common carrier is protected by Act of Parliament, if loss is occasioned by his own or his servant's wilful misfeasance or felonious act, notwithstanding that the company is not liable in absence of these defects. The Act of 1830 protects the company against accident or neglect but not wilful misfeasance. The Act of 1854 protects against neglect or default, but not wilful misfeasance, e.g. theft.

CARRIAGE BY SEA

Common carriers exist, as we have seen, at sea just as on land, and their common law liability is the same. Just as carriers on land are affected by statutory provision, so are sea carriers by the Merchant Shipping

Act, 1894, and they can also limit their liability by means of special contracts.

Merchant Shipping Act, 1894.—The modifications which are most important are as follows:—

1. The shipowner is not liable in respect of loss of life or injury to the person beyond an aggregate amount computed at £15 per ton of the ship's tonnage, nor in respect of goods beyond £8 per ton of the ship's tonnage, unless his own fault or privity contribute to the loss.

2. Further he is not liable for loss by robbery or embezzlement of gold, silver, watches, precious stones, or similar valuables unless the nature and value are declared in writing.

3. He is not liable for loss (without fault or privity) from fire.

4. Since under certain circumstances he is bound to accept the services of a pilot, the shipowner is excused loss occurring whilst his vessel is in charge of a qualified pilot, provided the employment of such pilot is compulsory.

Liability limited by contract.—If a shipowner wishes to limit liability by means of a special contract, he does so in either a charter-party or a bill of lading, which documents are respectively written contracts of affreightment or evidence of such contracts.

Charter-party.—A charter-party is a document embodying a contract, whereby a shipowner places his ship or a definite part of it at the disposal of a person for the conveyance of goods by sea. The ship so engaged is said to be chartered or freighted, and the person engaging it is called the charterer or freighter.

Bill of lading.—A bill of lading is not in itself the embodiment of a contract, although it does contain the terms of a contract. It is primarily a receipt given to a shipper of goods or his agent by the shipowner, or his agent (generally the master of the vessel), acknowledging receipt of goods and undertaking to carry them according to agreement to a port of destination, and to deliver the goods to the party producing the bill of lading. The document is an instrument of title to goods, and delivery with indorsement transfers the goods, which the bill represents, to the party to whom it is indorsed and delivered (as to negotiability, see "negotiable instruments").

Lay days—Demurrage.—In charter-parties and bills of lading a certain number of days are agreed upon, within which the goods to be shipped may be loaded or unloaded; these days are called "lay days" or "running days." If the stated time is exceeded, it is usually stipulated that a sum of money called *demurrage* be paid. Demurrage is calculated at so much per day on the ship's tonnage, and is payable as liquidated damages for loss sustained by detention of the vessel beyond the stipulated time for loading and unloading.

Freight.—When goods are shipped the shipper undertakes to render consideration to the shipowner for the carriage of the goods. This consideration payable in money is called "freight." There are various forms of freight—lump freight, time freight, and dead freight.

Lump freight is the sum payable by the party chartering a vessel to go on a specified voyage for a lump sum. Time freight is freight payable, as a rule, monthly, when a ship is chartered to go on a voyage for

a specified time, *e.g.* for nine months. Dead freight is the sum payable by a charterer in the nature of damages in case he fails to find a full cargo for the vessel chartered, as the shipowner is damaged by the failure.

PROPERTY IN BRITISH SHIPS

While dealing with the subject of carriage, a very brief review of the law as found in the Merchant Shipping Act, 1894, relating to the ownership of British ships will be found useful.

What is a British ship?—To obtain the privileges of flying the Red ensign, a ship must be registered at a British port, and be owned by British subjects or corporate bodies having their headquarters in the British Empire. If an alien, either by purchase, gift, or succession, becomes owner of a share in a British ship, that share is forfeited to the Crown. Property in a British ship is divided into sixty-four shares. A man may own all of these or any or one, but he cannot hold a part of a share, although a number of persons (not greater than five) can be registered as joint owners of one or more shares. For this purpose the joint owners are considered as one person. The number of persons registered as owners of one ship cannot exceed sixty-four. The register of the port, like the register of a company, can have no notice of a trust recorded on it. Hence a trustee is the real owner of a share of a ship according to the register.

Sale.—A British ship can be sold (but not to an alien if it is to retain its position as a British ship), and its transfer must be by a document signed, sealed, attested,

and delivered. Such document is called a bill of sale. It is exempt from the Bills of Sale Act, 1878, and must not be confused with a bill of sale of chattels. It requires registering at the port of registry of the ship. Mortgages are executed by bill of sale also similarly registered, priority between two mortgagees being determined by date of registering not by the date of the respective deeds.

Bottomry.—There are two other classes of mortgage, or rather hypothecation of ships, which though of little import now require to be noticed. Bottomry is an agreement in the nature of a bond, entered into by the owner of a vessel or the captain as his agent, whereby in consideration of a sum of money advanced for use in connection with the ship and her voyage, the borrower agrees to repay with interest if the voyage is brought to a successful issue. Such a security is usually given in a foreign port in respect of repairs to the ship, or her tackle, or the supply of provisions. To secure the repayment he hypothecates the ship.

Such cases do not often occur, but if it should happen that in the same voyage two bottomry bonds are required on the same ship, priority is given to the last, on the ground that without the last loan the ship would have been lost, and the first lender would not have recovered, hence the second lender is the means of giving the first a right to repayment.

Respondentia.—This is a similar bond, but in this the cargo is hypothecated and not the ship itself. An old form of contract existed in which the money was borrowed on personal security and the result of the voyage. The captain is not an agent by necessity, and so cannot

pledge his ship unless (1) he fails to obtain credit ; (2) money is absolutely necessary for the successful carrying out of the voyage ; and (3) he cannot communicate with his owners.

QUESTIONS

56. Define bailment.
57. Classify bailments.
58. State the liability of gratuitous bailee.
59. State the exceptions to the liability of a common carrier.
60. State the rights and duties of a carrier.
61. What is the position of a railway company in regard to the carriage of passengers ?
62. State the provisions of the Merchant Shipping Act, 1894, in regard to the liability of shipowners.
63. Define the following : charter-party, bill of lading, lay days, demurrage.
64. Discuss the question of ownership in British ships.
65. Distinguish between bottomry and *respondentia*.

CHAPTER VIII

SPECIAL BAILMENTS AND ALLIED MATTERS

Pledge or Pawn—Mortgages of Land, of Leases, of other Personal Property—Bills of Sale—Liens.

PLEDGE OR PAWN

What is pledge?—When a man leaves goods with another as security for the repayment of a loan, he is said to have pledged or pawned the goods. Pledge is a bailment, for the pledgor has the right to return of the goods on the completion of the object of the bailment, *i.e.* when the debt so secured is repaid. Such release of the goods by repayment is called redemption, and a party may transfer his right to redeem.

Right to redemption in personal property, unlike the right to redeem in mortgages, may be lost absolutely by failure to redeem within the time fixed in the contract; but if no time is fixed the pledgor has his whole life in which to redeem, unless notice to redeem is given by the pledgee. If the pledgor fail to redeem, the right of sale at once accrues to the pledgee without application to the Court, and any surplus after payment of principal, interest, and expenses, belongs to the pledgor.

Pawnbrokers and money-lenders.—Pawnbrokers or persons professing as a business to lend money on

goods as security for loans of less than £10, are governed by the rules of the Pawnbrokers Act, 1872, which enacts that a pledgor or his assignee of the right to redeem, may redeem at any time within one year, and seven days of grace, on production of the ticket issued by the pawnbroker as evidence of the contract and payment of principal, interest, and costs, including a charge for insurance.

Unless a pawn be redeemed within the stated period, the pledgor loses his rights, and goods of the value of ten shillings or under become the pawnbroker's absolute property. Goods from ten shillings to ten pounds in value are redeemable so long as unsold; but they cannot be sold by private treaty, they must be sold by public auction.

The pawnbroker is a bailee in a bailment for mutual benefit, and so in case of loss of the goods is only liable on proof that the loss arose from his negligence. He is, however, liable apart from negligence for loss by fire, hence he may charge for insurance (see above).

SUBJECTS SIMILAR TO PLEDGE

MORTGAGES

A mortgage is not a bailment, as in this class of contracts there is no property transferred, but only the title to it, subject to the transferor's right to redeem. It is perhaps well to treat of this subject here on account of its similarity to pledge.

Lands.—Mortgage of lands is not very important from a commercial standpoint, but still in a banking business legal mortgages are not uncommon. Legal mortgage is a conveyance of an estate or interest in land by deed subject to a condition (called the proviso for redemption), that the estate be reconveyed if the loan which it secures be paid by a certain date. If the debt be not paid by that date, the mortgagor may still redeem at any time before foreclosure or sale by the mortgagee. This right to redeem is known as the "equity of redemption," and it may be sold, or even mortgaged.

Remedies of mortgagee.—A mortgagee has four remedies, all of which he may adopt at the same time. (1) He may appoint a receiver of rents, etc., under certain circumstances, (2) take possession of the property, (3) sell, or (4) sue for foreclosure or sale, after default in payment has been made.

Equitable mortgages.—Equitable mortgages are of two kinds : (1) mortgage of the "equity of redemption," and (2) mortgage by deposit of title deeds with or without writing. This latter is a common form of mercantile security, and is adopted usually as security for a temporary loan or overdraft, and not as an investment. Even without writing, sect. 4 of the Statute of Frauds is not infringed, the mere deposit of deeds being evidence to rebut the presumption of fraud. The simple form of this class of security recommends it to commercial men and to bankers in particular, and if proper care be taken, it is a very good way of securing debts or loans, for the mortgagee has remedies in the courts very similar to those of a legal mortgagee, but

he has no power to sell except by permission of the Court, unless the mortgage is evidenced by a deed.

Leaseholds.—Mortgages of leaseholds are not a very favourable commercial investment. Difficulties arise as to the position of a legal mortgage. If the deed purports to assign the property, subject to the proviso for redemption, the mortgagee becomes liable as lessee to the rent and covenants in the lease. The better and more usual form is for a sub-term to be created, *i.e.* the mortgagor sublets to the mortgagee for the residue of the term less a few days, in which case the mortgagor is still lessee under the head lease, and is responsible to the lessor.

Deposit of lease.—Deposit of a lease is a favoured method, but it is at best a poor security, since if the mortgagor break any of the covenants in the lease it would be forfeited and the security lost. In such a case the mortgagee can claim no relief, not even the benefit of sect. 4 of the Conveyancing Act, 1892, which enacts that an under-lessee may be relieved from the effects of forfeiture of the head lease.

A further risk present in taking mortgages of an equitable nature is, that the property may be mortgaged already by a legal mortgage; but this is unlikely, as the deeds in that case will be in the hands of the legal mortgagee. Again, all deeds affecting the title should be in the hands of an equitable mortgagee, or the mortgagor may subsequently mortgage to a legal mortgagee who would have priority. If, however, a person is foolish enough to lend money on legal mortgage without the title deeds being forthcoming, he would be postponed

to a prior equitable mortgagee having the deeds, as in *Jared v. Clements*, 1903, 1 Ch. 428.

Mortgages of other personal property.—Money may be secured by mortgages on all kinds of personalty, e.g. life insurance policies, stocks, shares in companies, and goods. In these cases the mortgagee has power to sell by giving notice, if the mortgage be by deposit; if by deed, he has by virtue of the Conveyancing Act power to sell without notice.

Insurance.—The amount a person may safely lend on a life policy should not be more than the surrender value of the policy. The proper way to take such mortgage is by deposit with a covering memorandum setting forth the terms of the deposit; but it would seem that deposit alone gives the lender a lien on the policy.

Stocks and shares.—Government stocks, shares in companies, and debentures in sound trading companies are often the subject of mortgage, and form an excellent security in mercantile transactions. Deposit of shares alone gives the holder an equitable title only. The full legal title can only be obtained by transferring the shares into the name of the mortgagee or a nominee, and registering such transfer in the books of the company.

Blank transfers.—Blank transfers are of little use if the transfer is to be by deed, for if in this form the blanks cannot be filled in until after delivery, and nothing can be added to a deed after its execution. It is well to note that the articles of association of many companies require transfers by deed. Such blank transfer would simply be a memorandum, and would give no legal title; but if a deed is not required, a blank transfer

form authorizes the transferee to fill in the blanks, and the transfer is completed by registering. The person sending up the transfer to be registered thereby warrants the signature on the form, and so would be liable for loss if such signature be not genuine.

Bills of sale.—Mortgages, as distinguished from pledges of goods, are effected by means of bills of sale. In the case of pledge the goods are bailed (*q.v.*), but in the case of mortgage the mortgagor remains in possession, and can only be ejected in favour of, or by the mortgagee in certain cases, *e.g.* default of payment of the debt. Bills of sale are instruments whereby the transfer of personal property is evidenced. This is using the term in its fullest sense, and such instruments may be conditional (by way of mortgage), or absolute (by way of sale). Both classes of document require noticing, but in this chapter we are more concerned with the former.

Bills of Sale Acts, 1878, 1882.—There are two Acts of Parliament on bills of sale :—

1. The Bills of Sale Act, 1878, applies chiefly to absolute bills which are not given to secure loans. In such bills three conditions are required : (a) the consideration is to be truly stated ; (b) execution must be attested by a solicitor, and the attestation must state that the effect of the instrument was understood by the grantor ; (c) it must be registered within seven days, and registration must be renewed every five years.

2. The Amending Act of 1882 deals with bills of sale by way of mortgage as security for payment of money lent. Such bill must contain an inventory or list of the goods mortgaged, and it must be drawn

according to a form given in the schedule to the Act or it is entirely void. The same requirements as above do not apply to conditional bills, but the following must be fulfilled : (a) it must be attested by one or more credible witnesses not party to the bill ; (b) it must be registered within seven days ; (c) it must truly set forth the consideration, and is void if that consideration is under £30.

Seizure of goods.—Goods assigned under such a bill cannot be seized by the grantee unless :—

1. Payment at the time fixed is not made.
 2. Bankruptcy of the grantor occurs.
 3. Landlord distrains for rent, or distress for rates and taxes is effected.
 4. The grantor fails to produce receipts for rates, taxes, and rents, on notice in writing from the grantee.
 5. Execution be levied on the grantor's goods.
- Two bills of sale take priority according to dates of registering and not of execution.

LIENS

Lien at common law is the right which a person has to retain the property of another, until some debt or balance of account has been satisfied by the true owner of the property. In order that lien may attach, the property must have come into the possession of the person holding it, lawfully and in the ordinary course of business. Lien can be exercised even on account of a statute-barred debt.

Lien differs from pledge in that the goods are not

definitely placed (with the party holding) to secure a loan, the person exercising has no right to sell the goods retained, and the right is simply a passive right to hold the goods until the demand is satisfied.

There are various classes of lien both at common law and in equity, but equitable liens such as the lien of an unpaid vendor of realty are not questions of commercial law. The common law or possessory lien is found in two classes :—

1. Particular lien or specific lien which arises out of a presumption of law, and by virtue of which the person entitled to exercise it may retain particular goods until a demand arising out of *those* goods is satisfied. This class of lien may be claimed : (1) by carriers of goods for payment of charges for the carriage ; (2) by inn-keepers on the goods of guests for the payment of charges ; (3) by auctioneers on goods sold by them and on the price obtained, for any advances made and charges incurred ; (4) by shipowners on goods carried for freight ; and (5) by persons beneficially altering or repairing goods for the charges made by them.

2. General lien arises out of contract or custom, but seldom by presumption of law. Such lien is claimed on goods for a general balance of account, and not for a specific debt arising out of those goods. It has been legally decided that such a lien exists and can be claimed by bankers, insurance brokers, factors, and solicitors, and probably common carriers.

Bankers' lien.—1. Bankers have a lien on all securities or money of their customers coming into their hands in the ordinary course of business. As jewels, plate, etc., placed with a banker for safe keeping, do not come into

his hands in the ordinary course of business, it would seem that the banker has no lien on such things.

2. Insurance brokers have their lien on policies for their commission or premium paid by them.

3. Factors have a general lien on goods of their principals for advances made to them, or for the price of goods purchased by the agent on behalf of his principal.

Lien is lost by abandoning the claim, or by giving up the goods, except as to the lien of a shipowner, who may retain his lien even though he unships the goods and places them with a warehouseman.

Maritime liens.—Salvors have a lien on ships salved for salvage, and seamen have a lien or first charge on the ship and freight for wages. These liens are non-possessory, that is, the parties claiming cannot possibly hold the goods on which the claim is made. Such maritime liens are enforced in an Admiralty action *in rem* (against the thing).

QUESTIONS

66. What is meant by a pledge of goods?
67. State the regulations in regard to the redeeming of goods pledged with a pawnbroker.
68. Explain the meaning of legal mortgage, equitable mortgage, equity of redemption.
69. State the remedies of mortgagees.
70. Why is the deposit of deeds to secure a loan considered poor security?
71. Discuss the question of blank transfers of stocks and shares.
72. State the legal essentials of a bill of sale.
73. State the circumstances under which seizure of goods may take place under a bill of sale.
74. Define lien, and state how it differs from pledge.
75. Discuss the question of bankers' lien.

PART II

THE LAW OF PERSONS

CHAPTER IX

PARTNERSHIPS

Definition—Formation—Who are Partners—Holding out—Notice
—Liability of Partners—Duration—Power to bind the Firm—
Dissolution — Effects of Dissolution and the taking of
Accounts.

MERCANTILE persons are in the eye of the law of two chief classes, personal traders, such as one individual or a partnership, and companies.

The law as to sole traders is to be found throughout this work, and no special chapter is required. The law of partnerships and of companies, being the outcome of latter-day commercial activity and bulky legislation, requires to be treated in detail, whilst special notice must be taken of representative persons or agents in their relations with their principals.

PARTNERSHIP

The law affecting the business man in respect to negotiable instruments, insurance, tenancy, and bankruptcy will be dealt with later; at present we will

consider his position on the footing that, with a view of extending his operations, or of dividing his responsibilities, he wishes to enter into partnership.

Our Mr. Reader is negotiating a partnership, and the question is, what should he know, and how should he protect himself? The intending partner may have money and little business capacity, or he may be an active business man of wide experience, with little or no capital; these are points of great importance, and our friend's agreement must be couched accordingly. These and many other matters require careful consideration, and therefore it behoves Mr. Reader to have a knowledge of all that is implied by partnership, and to understand the extent of his rights, powers, and liabilities as a partner.

Definition.—In the Partnership Act of 1890 a definition is given which would include companies, but these are expressly excluded. This definition is as follows: "Partnership is the relation subsisting between persons carrying on a business in common with a view to profit." Companies under the Companies Acts, 1862-1900, are within this definition but are excluded, as also those under the Stannaries Acts, those holding a Royal Charter, and those incorporated under a special Act of Parliament, e.g. railway companies.

Persons entering into partnership are collectively called the "firm," but the firm has no recognized position in English law except in matters of procedure, i.e. the members cannot sink their identity in that of the firm, but actions for convenience may be brought by or against them in the "firm name," any judgment obtained is not given against the firm as such but against the members.

In this respect companies differ from partnerships, the company, under the Acts, 1862-1900, being a distinct artificial legal person, the shareholders sink their individuality, and are not liable beyond the amount unpaid on their shares; on the other hand, individual partners are liable jointly with their co-partner for all debts and liabilities incurred by the firm during the continuance of the partnership, to the full extent of their private and separate property.

Formation.—Partnership may be formed by implication, but is generally formed by contract, which may be oral, in writing, or in writing under seal. But writing is not necessary at law, unless the agreement is to continue for more than a year, or the object of the partnership is dealing in land (Statute of Frauds, sect. 4). If formed by a contract in writing or under seal, the provisions laid down in the deed or writing are those which regulate the conduct of the firm's business, and are called the "articles of partnership."

Who are partners.—By the definition in the Act we can see that "sharing of profits" is a necessary qualification of a partner, except in the unusual case where the liabilities of a partner are by law thrown on to one who has no share in the profits (*see* "Holding out"). Sharing of profits does not of necessity make a person a partner, although it is *prima facie* evidence that partnership exists, e.g. part owners are not necessarily partners.

Co-ownership.—Co-ownership and partnership are in many ways essentially different. The principal differences may be stated as follows :—

(a) Partnership is the result of an agreement, co-ownership may be, but is not necessarily so.

(b) Partnership involves sharing of profits and losses, co-ownership does not necessarily.

(c) A partner cannot assign his share in the partnership so that his assignee takes his place as partner except with the co-partner's consent. A co-owner may assign and put the assignee in his place. An assignee of a joint tenant becomes a tenant in common.

(d) Partners are agents (by implication of law) for the firm, and co-partners in the firm's business, but co-owners are not agents by implication although they may be by agreement.

(e) Partners have a lien on the firm's property for moneys lent to or paid (over and above capital) on behalf of the firm or in preservation of the firm's business or property. A co-owner has no such lien.

(f) Co-owners may have the specific property divided specifically, but on dissolution partners must wait for their shares until the whole property is sold. That is, they do not share the specific property, but only proceeds of a sale of the property.

The Partnership Act points out several cases in which persons sharing profits are not necessarily partners.

1. Receipt of a debt by a person by instalments out of accruing profits of a business is not in itself evidence of partnership between the debtor and creditor.

2. If the remuneration of a servant or agent is a share in the profits, he is not thereby constituted a partner in the business.

3. A widow or child of a deceased partner does not become a partner merely by receiving as an annuity a share of the profits.

4. A person does not become a partner by advancing money as a loan to a person engaged or about to engage in business, on an agreement that the lender receive interest at a rate varying with the profits. In order that this fourth rule hold good the agreement is to be in writing, signed by or on behalf of all parties.

5. A man is not constituted partner in a business by selling his own business and goodwill to another, and accepting as consideration an annuity from the profits.

Just as we have limited liability in company law, so we can view cases under 4 and 5, for, although not partners, persons as described under those heads cannot recover their principal in event of the bankruptcy of the borrower or buyer of goodwill respectively ; i.e. the lender will not be entitled to recover his loan, and the seller of the goodwill will not be entitled to his share of the profits until 20s. in the pound have been paid to other creditors.

“ HOLDING OUT ”

For purposes of fixing liability for debts, persons not sharing profits may under certain circumstances be looked upon by creditors as genuine partners in a firm. If a man represents himself by words, or conduct, or knowingly suffers himself to be represented as a partner, he is liable as a partner to any one who, on the faith of such representation, gives credit to the firm. Such a party is said to “hold himself out” as a partner. The commonest example is found in the case of a partner

retiring. If such partner give no notice of his retirement, he allows the customers and existing creditors of the firm to presume that he is still a partner. They may on strength of his credit, transact business with the firm, and can hold him liable.

Two conditions are necessary to make the person liable :—

(a) The holding out must be something done by, or with the consent of the parties said to be charged.

(b) The holding out must have been known to the other party, otherwise he could not have been misled.

Retiring partner's liability.—On retiring, a partner is still liable to creditors for debts incurred whilst he is a member of the firm, even though his co-partners have released him. In order that his liability shall cease, the creditors of the firm must also give him his release, such being the case when the creditors impliedly or expressly accept a new partner in place of the old one as their debtor. Release in this case is called "novation" (*see "Contract"*). Similarly a deceased partner's estate is liable for debts incurred by the firm previous to the partner's death.

If without coming to a settlement, the share of a partner be used in the partnership business after the partner's death or resignation, the partner, or his estate, is entitled to such share of the profits as, in the opinion of the Court, is due to him for such use of his share, or alternatively to five per cent. interest on the amount of his share. If, however, the partnership agreement provides otherwise, the above rule is not followed; e.g. if it provide for the purchase of the retiring partner's

share by the continuing partner or partners, then such interest is not payable.

Incoming partner.—An incoming partner is not liable without a contract to that effect, for debts incurred before he joined the firm, and he is not liable to creditors even though he takes over a retiring partner's liability, unless the creditor is a party to such novation.

Novation is a *tripartite* or three-cornered agreement between (1) the creditor, (2) the partner, who is either joining or retiring, and (3) the other partners. By a new agreement with the creditor this is substituted for the old one, either making a new partner liable for old debts, or releasing a retiring partner and accepting in his place the credit of the continuing partner either alone, or plus any new partners. Such an agreement may be express or implied, from a course of dealing between the creditor and the firm as newly constituted.

NOTICE OF RETIREMENT

In case of old customers and creditors, notice in fact must be given, *i.e.* by circular or some such method ; but in case of persons who have not hitherto dealt with the firm, an advertisement inserted in the *London Gazette* and advisably in the local papers, is sufficient notice of severance of partnership.

Dormant or sleeping partner.—A person may be a partner and not appear as such to the world at large. In such case he is a "dormant" partner, and his liability is just the same as that of an ordinary partner, but he may retire without giving notice to third parties,

as their contracts cannot be affected by his retirement, they having no knowledge of his existence as partner.

LIABILITY OF PARTNERS

1. *As to contracts.*—Partnership debts are joint debts of the members of the firm, and every partner is liable jointly not severally for all debts and obligations of the firm incurred while he is a partner. On death his private estate is also severally liable for such debts, so far as they are unsatisfied, subject first to payment of his private debts ; *i.e.* in cases of partnership debt, on the death of a partner, the creditors have the right to pursue their remedies at law against the surviving partner or partners, or to proceed in the Chancery Division against the deceased partner's estate, provided always that the private creditors first receive payment of their debts in full.

A partner's obligation commences when he joins a firm and continues to his retirement, with notice, when he ceases for subsequent liabilities to be liable.

Shortly, then, the firm is liable for the firm's debts ; separate property is liable for separate debts, and subject to that to the firm's debts ; but in case of death of a partner, creditors may claim upon separate property after payment of separate debts.

2. *As to torts.*—Partners are jointly and severally liable for wrongful acts of co-partners, when done in the interests of the firm. We must note that the acts must be done in course of the firm's business, or with authority of co-partners, or the firm will not be liable ; *e.g.* where a partner receives money from a customer in course of

business, and he misappropriates it, the firm is liable, or if the firm receives goods which are misapplied by a partner the firm is liable (*Rhoades v. Moules*, 1895, 1 Ch. 236).

3. *As to trust.*—Partners are not generally responsible for the acts of co-partners, who are trustees, and who improperly apply trust funds in the business of the firm. But should a partner have notice of the nature of the funds, he is liable for his co-partner's default (*Blyth v. Fladgate*, 1891, 1 Ch. 337). Beneficiaries can claim property in the firm's hands, which has not been yet applied by the partner trustee, unless the firm is a purchaser for value.

We may note that a person "holding himself out" as a partner, but not in reality being a partner, is not liable for the torts or breaches of trust of the firm's members; e.g. the liability of person "holding out" is based on the fact that credit is given to that person, and would not otherwise be given. Then if a person is injured by a van belonging to X., Y., & Son, X., Y., & Son may be responsible for their vanman's negligence, but B., who is not a partner, cannot be liable in an action for negligence, simply because X. and Y. hold out B. as a partner with his knowledge, or because B. has not given notice of retirement in a proper way.

PARTNERSHIP AGREEMENT

The agreement should be in writing and should set out all the terms of the contract, otherwise the Partnership Act, 1890, applies, and this may not be beneficial to a man who has laid the foundations of a business. It lies

with the parties as to what they deem to be the scope and purposes of the business. Again one partner may be restrained by agreement from doing certain acts, or from having certain authority which would otherwise be his, e.g. authority to pay by cheque.

Many matters of importance should be provided for in the partnership agreement, and well-drawn "articles" will, as a rule, include the following :—

1. The style of the firm or firm's name.
2. The nature of the business, which includes the whole question of administration, the extent to which a partner's authority is to be limited or controlled, and the powers to be given to a majority of the partners.
3. The duration of the partnership, and the time of commencement of business, which indicates the commencement of each partner's liabilities.
4. Questions of premiums, payment of premiums, and return of premium in case of premature dissolution.
5. The capital and property of the firm, how it is provided, and the uses to which it is to be put. If land is contributed by a partner, its value should be assessed, and that value credited to the partner as capital.
6. Interest on capital and time of payment, interest not being payable in absence of provision until profits are ascertained. Provision is often made for periodical drawings by partners against future profits with a further condition that excess be returned with interest.
7. Conduct of partners, limitation or extension of the statutory powers, e.g. individual partners may be restrained from drawing bills, etc., releasing partnership debts or becoming surety.
8. The keeping of accounts, annual taking of accounts

in order that the partners may know how they stand as between themselves and as to strangers.

9. An arbitration clause providing for resort to arbitration on points of difficulty arising in the conduct of the business or on dissolution.

If the agreement does not otherwise provide, or in the absence of agreement, all partners are bound by the following rules :—

1. All partners are entitled to share equally in the capital and profits of the business, and must contribute equally to all losses sustained by the firm.

2. The firm must indemnify every partner in respect of payments made, and personal liability incurred by him in the partnership business, or necessary to preserve the business and property of the firm.

3. A partner advancing money beyond the amount of capital to be subscribed by him, shall receive interest at 5 per cent. per annum from the advance.

4. No interest is paid on capital until an account has been taken and profits declared.

5. Every partner may take part in managing the business.

6. No payment can be claimed by any partner for services rendered, as he is bound to act in the firm's interests.

7. Books of the firm are to be kept at the principal place of business, and must be open to inspection by every partner, who may copy them or appoint a qualified and discreet agent to copy them for his benefit and in confidence.

8. A majority of partners decides difficulties in management, but the nature or scope of the business cannot be altered without the consent of all; and no

change in the constitution of the firm may be made without unanimous consent; e.g. no new member may be admitted without consent of all partners.

9. Where no time is fixed, notice by one partner to his co-partners will dissolve the partnership. Notice is best given in writing (this is compulsory where the firm comes into existence by a deed). Such a partnership is said to be at will.

If a term be fixed and the business continues after the term has expired, the partnership is considered to be one at will but subject to the old terms so far as possible.

Syndicate.—An exception to the rule that a partnership, in the absence of express stipulation, is a partnership at will, is met with in the particular kind of partnership which is usually called a syndicate. A syndicate is a partnership formed to carry out some one special financial or industrial project, as, for instance, to purchase, develop, and sell a particular building. Such partnerships (in the absence of express stipulation) are considered by the Court as intended to last until the termination of the adventure which is the subject of the partnership.

Uberrimæ fidei.—A partner is in the position of an agent, and must make no secret profit as against his principal, the firm; e.g. he cannot carry on private business of the same nature as the firm's without consent, nor can he, in capacity of buyer for his firm, purchase from himself goods for his firm; e.g. X. is a buyer for his firm of X. and Y., also he deals in certain goods necessary in X. and Y.'s business, X. cannot supply those goods to his firm without their consent. Any profit so made must be handed over to the firm.

Partnership is perhaps not strictly a contract *uberrimæ fidei*, but nevertheless utmost good faith must be shown during the continuance of the partnership.

Partners are bound to render true accounts of all transactions entered into by them in the course of business, and to give full information to all the other partners.

Each partner must account for any benefit derived by him without the consent of the other partners from :—

(a) Any transaction concerning the business of the firm.

(b) Any use of the partnership name or business connection of the firm. (This rule applies after dissolution by death until the firm is wound up.)

(c) Any profits of any business similar and competing with the firm of which he is a partner.

POWER OF A PARTNER TO BIND THE FIRM

Every partner is *prima facie* agent of his firm, and co-partners for the purposes of the firm's business. He has authority to bind the firm within the limits of the business, and can only be restrained by agreement. He can sell goods of the firm, pledge them, borrow money, and in a trading firm, draw, accept, and indorse bills, cheques, and give notes. He has no power without a "power of attorney" to contract under seal for the firm. Even an agreement that the partner shall not do certain acts is not good as against third parties without notice, for the implied authority of a partner cannot be privately revoked ; hence if A. pledges his firm's credit, and by agreement in the articles of partnership he is

restrained, A. may be responsible to the firm, but the firm is responsible to third parties (*see "Agency, Revocation"*).

Further, a partner cannot, unless a custom of trade is established, bind his firm by a guarantee, nor submit any matter to arbitration without consent. The firm will not be responsible for contracts outside the scope of the business. The partner may be liable in such cases, however, either for a breach of "warranty of authority" or on the contract.

Notice to partners.—Notice to any partner, who habitually acts in the partnership business of any matter relating to partnership affairs, operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of the partner.

A writ of execution cannot be issued against a firm except on a judgment against the firm.

Where a partner becomes indebted on his separate account and the creditor obtains judgment for the debt, he cannot take in execution the share of the partnership assets of the judgment debtor. He can issue a summons in the Court, and the Court may make an order charging the partner's interest in the partnership property with the payment of his separate debt. The Court will appoint a receiver of profits according to the share of the partner, such person is an officer of the Court. The Court will direct an account to be taken, and give any directions which can be given according as the circumstances of the case may require. Orders may be made for a sale, but the other partners may redeem the charge, or in case the Court has ordered a sale they may purchase.

DISSOLUTION

Dissolution may occur under the following conditions :—

1. By notice in case no time is fixed.
2. Efflux of time.
3. Completion of the object of the partnership ; e.g. for the working of a certain mine, the contract ending on the working out of minerals.
4. Death of a partner without other provision being made in the agreement or in absence of agreement.
5. Bankruptcy of a partner.
6. Illegality of object or of the contract itself ; e.g. contracts with an alien enemy are void, therefore, if X. an alien and Y. an Englishman are in partnership, and war breaks out between X.'s country and ours, the partnership is forthwith dissolved (*Griswold v. Waddington*).
7. By the court in the following cases :—
 - (a) When a partner is a lunatic or of permanently unsound mind, dissolution at the request of any partner or of the lunatic partner's representatives will be granted.
 - (b) When a partner is permanently incapable of performing his part of the contract (at any other partner's suit).
 - (c) At the suit of another partner, when a partner is guilty of conduct prejudicially affecting the business.
 - (d) When a partner wilfully breaks the partnership agreement, and so conducts himself as to make it impracticable to carry on the business.

(e) When the business is carried on, and can be only carried on, at a loss.

(f) When it is just and equitable to dissolve the partnership.

Conduct of a partner ground for dissolution.—The fact that a particular partner's continuance in the firm is injurious to its credit and custom, is not of itself ground for a dissolution when it cannot be imputed to that partner's own wilful misconduct. On the other hand, the conduct of a partner in the business carried on by the firm and its predecessors, though not in the actual business of the existing firm, which is calculated to destroy mutual confidence among the partners has been held sufficient ground for dissolution. Actual malversation of one partner in the partnership affairs, such as failing to account for sums received, is ground for dissolution. So also is a state of hostility between the partners which has become chronic and renders mutual confidence impossible, as where they have habitually charged one another, or some one partner has habitually charged another, with gross misconduct in the partnership affairs. But ordinary quarrels, or ill-temper on the part of a partner, are not sufficient to call upon the Court for a dissolution.

Remedies of an incoming partner in cases of fraud.—In the case of fraud or misrepresentation in the course of negotiations which resulted in a partnership, the defrauded partner may apply to the Court to decree a dissolution on the ground that it is "just and equitable." Then, in addition to any claim for damages in an action of deceit, the defrauded partner is entitled to:—

- (a) A lien on, or right of retention of, the surplus of the partnership assets, after satisfying the partnership liabilities, for any sum of money paid by him for the purchase of a share in the partnership, and for any capital contributed by him plus interest and costs.
- (b) A personal order for payment of such sums, together with his capital with interest and costs.
- (c) To stand in the place of the creditors of the firm for any payments made by him in respect of the partnership liabilities with interest.
- (d) To be indemnified by the person guilty of the fraud, or making the misrepresentation, against all the debts and liabilities of the firm.

EFFECTS OF DISSOLUTION AND THE TAKING OF ACCOUNTS

The partnership exists, after dissolution, as long as is necessary to wind up the concern. If on dissolution there be no sale of the goodwill nor any provision as to the use of the firm name, every partner may carry on business under that name, so long as in so doing he does not hold out his former partners are still continuing and so exposing them to risk of liability.

What are the rights of partners as to goodwill?

On the dissolution of partnership every partner has a right, in the absence of any agreement to the contrary, to have the goodwill of the business sold for the common benefit of the partners.

Where the goodwill of a business, whether carried on in partnership or not, is sold, the rights and duties of the vendor and purchaser are determined by the following

rules, in the absence of any special agreement excluding or varying their effect :—

1. The purchaser alone may represent himself as continuing or succeeding to the business of the vendor. But a vendor's wife cannot be restrained from carrying on a competing business on her own account, and in her own name.

2. The vendor may, nevertheless, carry on a similar business in competition with the purchaser, but not under the name of the former firm, nor so as to represent himself as continuing or succeeding to the business.

3. The vendor may publicly advertise his business, but may not canvass the customers of the old firm. But a partner who has been expelled under a provision in the articles, or a person, the goodwill of whose business has been sold by his trustee in bankruptcy, is not restrained from carrying on the same business on his own account, or soliciting the customers of the old firm.

4. The sale carries the exclusive right to use the name of the former firm, subject to this qualification, that the purchaser may use the vendor's name "only so long and so far as he does not, by so doing, expose the vendor to any liability." The purchaser has the right to trade as the vendor's successor, but not to hold out the vendor as still in the business and personally answerable.

A purchaser of "assets" without any restrictive terms, or a partner retaining the assets on dissolution, is entitled to the goodwill with its incidental rights.

Goodwill.—If the goodwill be sold or goes to any one of the partners by agreement, as we have seen, the

other partners are not precluded from setting up business in the same trade, and unless distinctly prohibited by their agreement, they may set up next door to their former partner, provided that they do not in any way solicit former customers, or lead the public to believe that they are continuing the old business.

As to what goodwill is, it is difficult to decide. According to Lord Eldon, it is nothing more than the "probability that old customers will resort to the old place" to transact their business, notwithstanding changes in the persons carrying on the business in that place. It may be defined as "The right to carry on business in a certain place, under the same 'style,' in the same business, and under the same conditions as existed when the person from whom the purchase was made carried on that business."

Return of premium.—Where one partner has paid a premium to another on entering into partnership for a definite period, and the partnership is dissolved before the period expires, the partner is entitled to the return of part of the premium unless the dissolution is due wholly to that partner's misconduct, or is due to death.

If X. and Y. are partners as solicitors for seven years, and owing to X.'s inexperience, he pays Y. £800 as premium, then if Y. prays for a dissolution after two years on account of X.'s incompetence, X. is entitled to the return of part of the premium proportionate to the unexpired portion of the term (*Atwood v. Maude*, 3 Ch. A. 369).

Authority after dissolution.—A partner's authority to bind his firm continues after the dissolution so long as

the firm exists as a going concern for winding-up purposes.

ACCOUNTS

Each partner is entitled on a dissolution to have:—

1. The firm's property realized and applied in payment of debts of the firm and other liabilities.
2. The surplus applied to pay what is due to the partners for: (a) interest and principal of loans; (b) capital; (c) profits.

If no agreement exists. Losses are to be paid first out of profits, next out of capital, and if not then covered, by the partners in the same proportion as they share profits. *E.g.* A., B., C. are in partnership with a capital of £5000. Their net losses are £7000. A., B., and C. contribute capital and share profits in proportion of 2 : 3 : 5. The capital would reduce losses to £2000 to be paid by A., B., and C. in proportion of 2 : 3 : 5, i.e. A. pays £400; B. pays £600; C. pays £1000.

If any assets remain after the losses are covered, they are applied as follows:—

(1) In paying debts and liabilities of the firm to persons not members of the firm. (2) In paying advances made by partners, and if the money is not sufficient and several partners have lent money these loans are repaid rateably, presuming there to be any surplus after payment of debts. (3) In paying capital out to each partner rateably as in (2). Lastly, if any assets remain they are divisible amongst partners in the same proportion as the profits are.

Insolvent partner.—In the recent case of *Garner v.*

Murray, it was held that the loss sustained by some of the partners because of the default of another partner, when adjusting their respective rights between themselves after all the debts due to outside creditors have been paid, must be distinguished from a loss of the firm as a whole, and not be borne by the non-defaulting partners in the proportions to which they are entitled to share profits and losses. It must be borne rateably according to the amount of capital respectively due from the firm to them, account being taken of the contributions from each partner in respect of any deficiency of capital.

From what we have seen, the share of a partner in a firm is not something tangible, it is a right to receive in due course and in the events mentioned a certain proportion of the existing partnership assets remaining at any given time if all were realized (turned into money), and all debts and liabilities discharged.

Thus realization is necessary even in case of land, and for partnership purposes land of the firm becomes personal property. Hence all that a man can claim arising out of partnership, even if it be land, will on his death go to his personal representative, and not through his personal representative to his heir-at-law.

It is sometimes said that sale of a share by a partner works dissolution, but this is not so. If, however, a partner allows his share to be charged by way of execution for a judgment debt against himself, the other parties may dissolve or redeem the share.

The assignee of a share has no rights as against the other partners to be admitted into the firm. He is not a partner, as no person can introduce a new partner

without the consent of all. His rights are against the partner assigning, who is still considered to be a partner. The assignee can claim profits and on dissolution can claim whatever his assignor is entitled to.

A number of persons greater than twenty, and in banking greater than ten, cannot carry on business in partnership, but must register as a company under the Companies Acts, 1862-1900.

QUESTIONS

76. Define partnership.
77. Mention instances of persons sharing profits who are not necessarily partners.
78. What is meant in partnership by "holding out," and state the liability?
79. State the liability of partners in regard to torts, trusts.
80. Suggest points to be included in a partnership agreement.
81. What is meant by a partnership at will?
82. To what extent may a partner bind the firm?
83. Under what circumstances may a dissolution of partnership occur : (a) By order of the Court? (b) Without the Court's interference?
84. Define goodwill, and discuss the question of dealing with it on the termination of a partnership.
85. State the rules governing the settlement of accounts on a dissolution of partnership.

CHAPTER X

COMPANIES¹

Definition—Formation—Registration—Memorandum of Association—Articles of Association—Prospectus—Directors—Capital Shares—Liability of Shareholders—Meetings and Resolutions—Debentures—Winding-up—Railway and other Companies.

MR. READER having successfully negotiated with the persons required to join him in partnership, and having met with success, may, with his friends, think it advisable to put their firm on such a footing that their liability shall be limited and the scope of their business accurately defined. They may do this by complying with the Companies Acts, 1862-1900, and "floating" their concern as a limited liability company. They may float it without limiting liability, but such a course is seldom adopted.

Definition.—A company within the Acts mentioned, generally called a "joint stock company" is "an association of individuals carrying on a business for profit, possessing a common capital contributed in defined proportions by the individuals composing the association, such capital being divided into shares, of which every individual possesses one or more, and which are

¹ Fuller details on this head can be obtained from "Secretarial Work and Company Law," by the Publishers.

transferable by the owner" (*see "Assignment of Shares by a Partner"*).

This definition shows us that we are dealing not with a number of persons as in partnership, but with an "association" composed of individuals. It is this association which is a legal person and with which we deal. Each individual sinks his personality in that of the company, and his private estate is not liable for the debts of the company, although he is personally liable to the company or its liquidator to the extent of his shares or guarantee.

Formation.—Let us now see how a company can be formed. We must have seven individuals at least, not necessarily business men nor adults, but, at any rate, they must be able to subscribe to the documents of association. Each of the seven members must have at least one share, then if two persons are in partnership with a capital, say, of £1000, they could float their company, having five friends or relatives to take up a share each, and the rest would be allotted between the partners. The advantage of this arrangement is that the partners are limited in liability. Such an arrangement is usually styled a private company. In such cases, unless it is otherwise agreed, the questions of assignment of shares and introduction of new members offer no difficulties as they do in partnership. Again, if a person who is a partner dies, the partnership is at law dissolved; but in the case of a company death will not dissolve the association, provided always seven members at least are on the books of the company. Failure to comply with this rule of maintaining the number of members at seven renders every member

personally liable, provided the business has been carried on for six months with the reduced membership and the member has had knowledge of the state of affairs.

Registration.—The minimum of seven persons must subscribe to a document called the "Memorandum of Association," registering the same with the registrar of joint stock companies, according to the provisions of the Acts, 1862–1900.

The effect of registering, if proved by a certificate from the registrar of joint stock companies, is to make the parties so registered a body corporate, able to act as one body, and to show their combined will by use of a common seal. The ordinary joint stock company can now issue its prospectus and invite the public to subscribe to shares, whilst the private company already mentioned may commence business forthwith.

Before the registrar will register, the names of directors must be supplied together with a statement, in a form required by the Acts, declaring that the requirements of the Companies Acts have been complied with.

Memorandum of Association.—1. The Memorandum of Association must state exactly the name of the company followed by the word "limited," unless in case of a non-trading company, not existing for profit, the word "limited" is expressly allowed to be omitted. This name must appear on the seal of the company, and on all documents or papers issued by or for the company in its business, *e.g.* prospectus, advertisements, business forms, orders, invoices, bills of exchange, etc.

2. The situation of its registered office must be

stated in the memorandum. The name of the company is to be legibly printed or engraved outside the office, and the word "limited" must not be omitted.

3. The objects of the company must be explicitly set out, and the members of the company are bound by the statements there made. No change can be made in the memorandum without certain formalities. Previous to 1890, when the Companies (Memorandum of Association) Act was passed, a company had as a rule to be wound-up and reconstructed in order to change or enlarge the scope of its business ; now, however, a company can, by virtue of this Act, alter the memorandum by special resolution to be confirmed by the Court ; e.g. a company may enlarge its business or change the area of its operations, restrict its own rights, and even abandon them in this way (see *Re Fraser, Ltd.*, 1903).

4. The memorandum must also state that the company is limited, or rather that the liability of members is limited to the amount of the shares held by them respectively.

5. The nominal capital must be stated, the number of shares into which it is divided and the amount of each share.

A declaration of agreement to take shares is made by seven subscribers. Usually each signs for one share in order to qualify. Each signature is, of course, attested.

Articles of Association.—Another document generally accompanies the memorandum, which is called the "Articles of Association." This document must be in existence in case of companies which have no limit of liability or companies limited by guarantee, but not

necessarily so in companies limited by shares, for the Act of 1862 provides in its first schedule a list of model articles, called Table A, which sets forth certain regulations applicable in such cases, so far as they can be made applicable.

For companies registered after October 1, 1906, a revised Table A has been issued for the use of companies registered after that date. Any company may avail itself of this table, either with or without modifications.

According to Lord Cairns, the memorandum is the charter of the company, the articles being a document defining the duties, rights, and powers of the governing body, the method of carrying out the objects of the company as set out in the memorandum, and the way in which these regulations of the company shall be altered or made. They may be altered or added to by a special resolution, always, of course, in conformity with the Acts and with the memorandum. A contract not to alter the articles would be void, as a company cannot contract out of its statutory right to alter.

Prospectus.—We have seen that a public company on registration may now issue a prospectus. What does this mean? A prospectus is a document put forward by the directors and others interested to invite and induce persons to take up shares in the company. It must state the names and addresses of vendors of property to the company, the price, the dates, the goods sold, and all parties to material contracts, together with a full account of the interest of every director in the promotion of the company. It must be signed and dated, and must be registered before it is issued.

The term "prospectus" legally means, according to the Act of 1900, "any notice, circular, or advertisement" offering to the public any shares or debentures for subscription or purchase. Such documents are usually issued on formation of the company, on reconstruction, or issue of further capital.

It is the custom to put the company's case in the best light, but it must at the same time be remembered that the Directors' Liability Act, 1890, passed on account of the decision in *Derry v. Peek*, 14 A. C. 337, and the Companies Act, 1900, provide stringent remedies for misrepresentation, even if honest, unless supported by expert evidence or an extract from official government documents. A person taking shares on a fraudulent misrepresentation may have his name removed from the register, unless winding-up has commenced, i.e. rights of innocent third parties for value, such as creditors, have accrued. He may also in such circumstances sue the persons—directors, secretary, or promoters—responsible for the misrepresentation.

Directors.—All the partners in a firm may, as a rule, take part in the management of the business, but in companies, on account of the number of shareholders and other matters, the ordinary administration of affairs is put into the hands of directors. The directors have certain authority to act as agents of the company, and any act outside the authority may, if within the power of the company, be ratified by the shareholders; but anything not provided in the company's memorandum is *ultra vires* (beyond the power) of the company, and if done by a director, cannot be ratified so as to bind the company.

A man may not act as a director of a joint stock company unless he has consented to do so, and has signed the memorandum, or contracted in writing to take up the shares necessary to qualify him for the post. This consent and contract is to be filed with the registrar. He is bound to take up the shares contracted for within two months, and he must retain them so long as he wishes to remain a member of the board of directors. Failure in this latter respect is subject to a fine of £5 per day, from the time of ceasing to hold the necessary shares to the time of ceasing to be a director or requalifying.

Directors are subject to all the rules as to agency (*see "Principal and Agent"*).

The capital.—In the memorandum the amount of capital is stated. This is divided into shares, *e.g.* of £1 each, but it is not always fully subscribed. The part that is subscribed is called issued capital as opposed to the total capital stated, *i.e.* nominal capital. The proposed or nominal capital of a company may be £20,000; but only £15,000 is “issued” to and subscribed for by the public. It is not customary for a subscriber to pay the full amount of his share at once, and therefore, although the issued capital be £15,000, the company may require only, say, 5s. per share. This 5s. is the paid or called-up portion of a share, the result being, that of the £15,000 issued capital only £3750 is “paid” or “called” capital, the remainder being “unpaid” or “uncalled,” and remains as a reserve available at call for future emergencies.

Reserved capital.—It is possible for a company to provide that “uncalled” capital shall not be called

except for winding-up purposes, otherwise, as more money is required, calls are made on the shareholders. This reserve capital cannot be dealt with or charged by the directors ; and should it be desired to re-convert the same into ordinary capital, leave of the Court would have to be obtained.

Calls on shares.—The revised Table A contains the following clauses in regard to this important matter :—

“ The directors may from time to time make calls upon the members in respect of any monies unpaid on their shares, provided that no call shall exceed one-fourth of the nominal value of the share, or be payable at less than one month from the first call ; and each member shall (subject to receiving at least fourteen days' notice, specifying the time or times of payment) pay to the company, at the time or times specified, the amount called on his shares.

“ The joint holders of a share shall be jointly and severally liable to pay all calls in respect thereof.

“ If a sum called in respect of a share is not paid before or on the day appointed for payment thereof, the person from whom the sum is due shall pay interest upon the sum at the rate of £5 per cent. per annum from the day appointed for the payment thereof to the time of the actual payment ; but the directors shall be at liberty to waive payment of such interest wholly or in part.

“ The provisions of these regulations as to payment of interest shall apply in the case of non-payment of any sum which by the terms of issue of a share, become payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the

same had become payable by virtue of a call duly made and notified.

"The directors may make arrangements on the issue of shares for a difference between the holders in the amount of calls to be paid and in the times of payment.

"The directors may, if they think fit, receive from any member willing to advance the same all or any part of the monies uncalled or unpaid upon any shares held by him ; and upon all or any of the monies so advanced may (until the same would, but for such advance, become presently payable) pay interest at such rate (not exceeding, without the sanction of the company in general meeting, six per cent.) as may be agreed upon between the members paying the sum in advance and the directors."

When all shares are paid up more capital may be issued from time to time until the maximum of the nominal capital, £20,000, be reached. If authorized by its articles, any company limited by shares may modify the conditions of the memorandum as to capital. It may issue new shares, consolidate its capital and divide into larger shares, *e.g.* consolidate £1 shares and re-divide into £10 shares ; or it may convert paid-up shares into stock.

Capital may be reduced under the Acts of 1867 and 1877, but reduction must be confirmed by the Court, unless the unissued shares only are cancelled.

Shares.—Shares are subscribed for in the ordinary form of contract, *i.e.* offer and acceptance. We must not think, however, that the offer is contained in the prospectus. The prospectus is only an offer to treat.

The contract is entered into by a would-be subscriber offering to take a certain number of shares. If the whole of the shares are applied for, the directors may accept the offers or, as it is said, proceed to allotment; but should the whole not be applied for, allotment cannot be proceeded with until at least the minimum, or if no minimum be mentioned, then the whole, number of shares as provided in the documents of association have been applied for and the application money paid. This is to stop any tendency to proceed to allotment on applications, from the result of which there would be little chance of carrying on the company's operations successfully.

At allotment a fixed amount is stated as the value of a share, and so long as the business is a going concern, the share has nominally that fixed and definite value, although on transfer that amount may not be obtained; e.g. £10 share may only sell on the Stock Exchange for 27s., or it may sell for £12, according to the security and soundness of the company.

On winding-up, a share means, as in partnership, a definite proportion of the joint estate of a company after it has been realized and applied in payment of the joint debts of the company.

Register of members.—A register of all persons holding shares must be kept. If a person holds shares in trust for another, the person holding is the registered member, and no notice of the trust can appear in the books. Hence, the trustee is the one liable to pay calls, but, of course, the person for whom he holds must indemnify him (*Harroon v. Beliliros*). The register is to be open for the whole year, except thirty days at most,

and can be consulted by members free of charge. Any mistake can be rectified by appeal to the Court.

Preference shares.—If the memorandum so authorizes preference shares may be issued. Such shares give the holder a preference as to dividends over ordinary shareholders, and in some cases preference in distribution of capital on winding-up. They are of two kinds—cumulative and non-cumulative. The former entitle the holder to receive in subsequent years any sum which he should have received in previous years had a full dividend been paid, the latter are payable out of the year's profits only. If it is proposed to make preference shares non-cumulative, the articles must clearly state such fact, as otherwise they are presumed to be cumulative.

Founders' shares.—Founders' shares are allotted to the founders or promoters of a company. They generally provide that a certain dividend be paid on ordinary shares before any dividend can be paid on such founders' shares, *i.e.* dividends are payable out of surplus profits after a given rate is paid on ordinary shares.

Deferred shares are those generally allotted to the vendors of a business in part payment of the purchase money, and in which the claim upon the distribution of the profits is waived until the ordinary and preference shareholders have received certain dividends.

Consideration.—Shares may be paid for in money or money's worth, but they cannot be issued at a discount (of course they may often be purchased on the market at a discount), the full nominal amount must be paid. As to payment other than in money, the Companies Act, 1900, provides by sect. 7 that when shares are allotted

in whole or part for consideration other than cash, there must be a document filed with the registrar of joint stock companies, showing (1) a contract in writing showing the allottee's title, together with a statement as to sale, services, or consideration in respect of which the allotment is made; (2) the number and amount of shares so allotted, and the extent to which they are treated as paid up. If such document be not registered within the month, a penalty of £50 per day is payable by every officer of the company knowing of the default.

Certificates.—When a person's application is accepted by allotment, a document known as a share or scrip certificate is issued to him, stating that the person named therein is registered in the company's register as a holder of the stated number of shares. This certificate is, as a rule, issued under the seal of the company, and the company cannot deny the rights of the party holding such certificate.

Forfeiture of Shares.—Most articles provide that should a shareholder not pay the calls made upon him, or should owe any debt to the company, his shares may be declared forfeited, and be re-issued to a purchaser at such a price as they may bring. Unless provision is made in the articles, the calls not paid on the shares forfeited cannot be claimed against the shareholder.

Sale of shares.—A shareholder may transfer his shares, but in doing so he is subject to the regulations of the company. In order to facilitate dealings with shares they are marked with a certain number, and a shareholder is said to hold, say, ten shares numbered — to —.

The Table A before mentioned provides rules as to transfer in absence of articles, viz.—

“The instrument of transfer of any share in the company shall be executed both by the transferor and the transferee, and the transferor shall be deemed to remain holder of such share until the name of the transferee is entered in the register book in respect thereof.”

The directors consider every transfer before registering it, and they may refuse to register if the transferor is their debtor. But they may be liable in damages to a transferee for refusing to register on account of a doubt as to the title of the transferor to whom they have issued a certificate (*Re Ottos Co.*, 1893, 1 Ch. 618).

Dividends.—The profits of a company are distributed among the members in the form of dividends ; the articles usually determining the manner.

The revised Table A contains the following clauses in regard to dividends and reserves :—

“The company in general meeting may declare dividends, but no dividend shall exceed the amount recommended by the directors.

“The directors may, from time to time, pay to the members such interim dividends as appear to the directors to be justified by the profits of the company.

“No dividend shall be paid otherwise than out of profits.

“Subject to the rights of persons (if any) entitled to shares with special rights as to dividend, all dividends shall be declared and paid according to the amounts paid on the shares ; but if and so long as nothing is paid up on any of the shares in the company, dividends may

be declared and paid according to the amount of the shares. No amount paid on a share in advance of calls shall, while carrying interest, be treated for the purposes of this clause as paid on the share.

“The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as a reserve or reserves, which shall, at the discretion of the directors, be applicable for meeting contingencies, or for equalizing dividends, or for any other purpose to which the profits of the company may be properly applied, and, pending such application, may, at the like discretion, either be employed in the business of the company, or be invested in such investments (other than shares of the company) as the directors may from time to time think fit.

“If several persons are registered as joint holders of any share, any one of them may give effectual receipts for any dividend payable on the shares.

“Notice of any dividend that may have been declared shall be given, in manner hereinafter mentioned, to the persons entitled to share therein.

“No dividend shall bear interest against the company.”

The question of mortgage of shares is briefly viewed under the head of mortgages of personal property.

On a shareholder's death his shares pass to his personal representative, who may be registered as a member on production of probate, or alternatively he can transfer to another without registration.

Leeman's Act, 1867, may here be mentioned as touching on share transfer. It applies to transfer of

bank shares ; under it brokers are prohibited from sale, or purchase of such shares unless the same are distinguished by their numbers. This Act is often by custom of the Stock Exchange contravened, although the members are aware that the custom is not legally binding.

Liability of shareholders or members.—Members' liability may be limited in one of two ways : (1) by guarantee ; (2) by shares.

1. A man may state what amount he will be responsible for in event of winding-up. This put in the form of a guarantee is his agreement. He is liable to that full amount and no further.

2. A person is liable to pay all the unpaid moneys required to make his shares fully paid up, but he is not further liable. If he has paid up the nominal amount he is exempt from any further liability.

As we have seen, members are not individually liable in respect of debts, but the Act of 1862 declares that, in event of winding-up, (1) Every present member or past member is liable to contribute an amount sufficient to discharge liabilities, costs, etc., of winding-up, provided always as under (5). (2) No past member is liable if one year has elapsed between his ceasing to be a member and the commencement of the winding-up. (3) No past member shall be liable for anything done or incurred after his membership ceased. (4) No past member is liable unless present members are unable to satisfy the contributions required. And (5) no contribution is required from any member, past or present, beyond the amount unpaid on his shares or former shares.

In event of winding-up, a list of contributories is made, present members being on one list, called the "A" list, past members on a second, the "B" list. The former are made liable first.

Stock and share warrants.—Any company may convert paid-up shares into stock, and though no person can hold a fraction of a share, yet stock is divisible into any proportion.

With respect to such stock or shares a company may, if within its own bye-laws, issue under seal a share warrant to bearer, *i.e.* a document of title transferable by delivery, stating that the bearer is entitled to certain shares or stock named therein.

Such warrant seems to be negotiable, and the holder may claim to be registered as a member of the company; but this registration is not essential, as the articles generally provide that production of the warrant entitles the holder to act as a member, *e.g.* record his vote at a meeting.

Meetings of shareholders.—Shareholders' meetings must be held once each calendar year. A first meeting is required under the Act of 1900 to be held within a period of not less than one and not more than three months from the date at which a company may commence business.

The shareholders have power to demand an extraordinary meeting, if shareholders representing one-tenth of the issued capital desire it.

Resolutions.—Resolutions are ordinary, special, and extraordinary, and voting may take place by attendance of shareholders themselves or representatives, who must themselves be shareholders, bearing an order in writing

signed by the shareholder. This order is called a "proxy."¹

Ordinary resolutions are passed by a simple majority of shareholders at a duly convened meeting.

Special resolutions are passed by a majority of three-fourths of those present at a duly convened meeting, and confirmed by a simple majority at a subsequent meeting held not less than fourteen days, but within one month, after the first meeting.

An extraordinary resolution is one that would be a special one if confirmed as stated.

Loan capital.—Loan capital is simply money borrowed without any security. It is a simple debt due to the party lending, and has no preference over any other debt.

Debentures.—An ordinary trading company under the Acts, 1862–1900, has an implied power to borrow as much money as is required for the reasonable business of the company. The extent of the borrowing power is not, as a rule, left so wide as this, but it is limited and accurately defined by the memorandum or the articles of association. When so defined the company cannot borrow in excess of the stated amount.

The general way of raising money is by issue of debentures, *i.e.* instruments under the common seal of the company, containing a promise to repay a sum of money advanced at a specified time and subject to the conditions specified in the instrument, and in the mean time agreeing to pay a certain rate of interest on the money advanced. This promise is generally secured by the creation of a charge on the property and business.

¹ For further information in regard to "proxies," see "Secretarial Work."

Such a "floating charge," as it is called, along with the debentures secured, is called a "mortgage debenture," such documents in fact amount to a mortgage on the property charged.

The charge does not, however, become definite until certain events happen, viz.: (1) when a receiver is appointed on behalf of debenture holders; (2) when proceedings for winding-up commence; (3) when default is made in payment of interest on the debentures or in payment of principal when due.

Previous to any of the above events, the company may deal with its property in the ordinary course of business; hence mortgages made on the security of the company's property, if in the nature of a legal mortgage over a specific portion of the estate, are good as against debenture holders, providing their charge is still a floating charge. Such a mortgage has priority over debenture holders, but only if the mortgage is in the ordinary course of the company's business, and it would not have priority if the mortgagee had notice of the charge created by the debentures.

Sometimes companies are debarred from creating a legal mortgage to take priority of the debenture holders.

There are certain debts which have priority over the debenture holder's "floating charge," e.g. wages, distress for rent, rates, and taxes, etc. ("Preferential Payments in Bankruptcy").

Debentures may be issued at a discount, and in this respect they are unlike shares which are to be subscribed at nominal value. They do not require to be registered as a bill of sale, even though they give a charge on

personal chattels, although any mortgage mentioned in sect. 14 (1) of the Act of 1900, whether secured on property, uncalled capital, or the business generally, requires filing with the registrar of companies within twenty-one days. The effect of default is that the security is lost as against the liquidator, who can realize for the benefit of creditors generally and the mortgagee or debenture holder becomes an unsecured creditor.

Failure to register such charges makes the directors, manager, secretary, or other officer liable to a fine of £100, if he knowingly or wilfully authorizes or permits the failure; and although the company is the person to register, yet a holder might register, and, in fact, any person interested has that right.

In some cases a mortgage deed exists apart from the debentures issued; this "covering or trust deed," as it is called, conveys the property of the company by way of mortgage to a trustee, who holds in trust for the debenture holders.

Winding-up of a company.—At common law a company cannot wind up, it being a person having a perpetual existence. The only way to dissolve was originally by delivery up of its charter of incorporation. Now by a series of enactments it is possible for a company to bring its existence to a close either at the instance of its members, as set forth below, or at the instance of its creditors.

Under the Companies Acts any company can be wound up; even an unregistered company, consisting of more than seven members, can wind up under the Act of 1862.

Objects of winding-up.—The Act says that winding-up is necessary “that the property of the company shall be applied in the satisfaction of its liabilities . . . and subject thereto . . . be distributed among the members according to their rights and interests.”

A company may be wound up in one of three ways, either (1) voluntarily; (2) voluntarily, but under supervision of the Court; or (3) compulsorily, by order of the Court.

1. *Voluntary.*—This occurs at the expiration of the period fixed for carrying on the operations of the company, or when its objects have been attained, and the company in general meeting has passed an ordinary resolution to the effect that the company shall be wound up. Again, if the company passes a special resolution requiring the company to be voluntarily wound up, e.g. in case of amalgamation or reconstruction on a new basis.

Lastly, if on account of the liabilities of the business the company cannot continue, it may be voluntarily wound up after an extraordinary resolution to that effect has been passed.

2. *Supervision of Court.*—Voluntary winding-up begins on the date of the passing of an effective resolution, but a creditor is not on this account barred from taking proceedings to have the winding-up proceedings carried out by the Court. If the Court thinks fit an order is made directing that the winding up shall be by the Court or continue under its supervision. The liquidator appointed by the company may continue in office subject to the control of the Court.

3. Compulsory winding-up is something allied to

the bankruptcy of an individual. It is brought about by order of the Court on a petition being presented to the Court in any of the following instances :—

- (1) In case of the company itself passing a special resolution requiring it to be wound up.
- (2) In case of business being suspended for a year, or delay in commencing of one year.
- (3) When the company has less than seven members.
- (4) When it is just and equitable to wind up.
- (5) When the company cannot pay its debts, *e.g.*
(a) where a creditor or creditors for an amount of £50 or over serves a demand on the company requiring payment and the company neglects to pay, secure, or compounds within three weeks ; (b) when execution is issued and remains unsatisfied ; (c) where it is proved that the company cannot pay its debts.
- (6) In case a company fails to hold its statutory meeting (sect. 2 of Companies Act, 1900), or fails to file a certified report as to shares allotted, cash received, and other particulars required by the registrar.

Compulsory winding-up is conducted by the official receiver in bankruptcy in the area in which the company's registered office is. The official receiver is provisional liquidator, but the creditors may apply for another to be appointed by the Court. The liquidator is an officer of the Court, responsible to the Court. His duty is to convert the assets into money and distribute amongst the creditors. He draws up a list of contributories under the heads of past and present members, the former being secondarily liable, as we have seen, in case of default of the latter.

Other classes of companies.—There are other classes

of companies, or, to give them a more general name, "corporations," than those incorporated under the Companies Acts, 1862-1900. Corporations are incorporated by Act of Parliament or by Royal Charter.

Charter.—Our universities, chartered companies, and chartered professional bodies owe their existence to their charter. Their constitution is not a matter for commercial law.

Companies Clauses Consolidation Act.—Railway companies, and other companies formed to execute undertakings of a public nature, are incorporated under the Companies Clauses Consolidation Act, 1845, and its amending Acts, 1863-1890. Their charter and regulations are not found in the ordinary memorandum, but are embodied in an Act of Parliament specially passed for their benefit.

Stannaries or cost-book companies.—Cost-book companies are partnerships not bound by the Partnership Act, 1890, if local custom can be shown contrary to the Act. A member can retire at will, and by relinquishing his shares determine his liability, if he pay his share of the liabilities (if any), and he may receive his share of the surplus remaining when the liabilities are taken from the assets in case of solvency. He is not liable for debts if he has ceased to be a partner two years before winding-up or two years before the mine is closed (chiefly mining companies in Cornwall and Devon). The members are represented by a manager, called the "purser," who works the mine and keeps a register of receipts, expenditure, members, etc.

QUESTIONS

86. Give a definition of a joint-stock company.
87. State a few points in which a joint stock company differs from a partnership.
88. What particulars must the memorandum of association contain?
89. Distinguish between the memorandum and the articles of association.
90. State the particulars to be given in a prospectus, and the conditions to be complied with.
91. What is the extent of the authority of directors in dealing with the affairs of a company?
92. State and give the meaning of the various terms used in connection with share capital.
93. What is the position of a trustee in regard to the holding of shares?
94. Distinguish between cumulative and non-cumulative preference shares.
95. Give the provision in Table A respecting the transfer of shares.
96. What is the extent of the liability of past members in the event of the winding-up of a company?
97. What are ordinary, special, and extraordinary resolutions?
98. What is meant by an issue of debentures? Mention various forms of debentures.
99. Describe the methods of winding-up a joint-stock company.
100. What is the position of a member of stannaries companies?

CHAPTER XI

PRINCIPAL AND AGENT

Definition—Formation—Scope—Breach of Warranty of Authority—Capacity—General and Special Agents—Rights and Duties of Principal and Agent—Responsibility of Agent and Principal to Third Parties—Determination of Authority—Classes of Agents : Auctioneers, Brokers, Bankers, Factors, *Del credere.*

IT is impossible for a principal to do every act required in the course of his business, and so he employs servants and agents to represent him in certain of his commercial transactions. The relationship of principal and agent is generally brought about by contract. As Sir William Anson points out, every person employed by a principal is not to be deemed an agent, but every person employed to bring about legal relations with third parties is an agent ; *i.e.* “agency is not co-extensive with employment,” but is a branch of the contract of employment. Again, the agent is not necessarily the servant of the principal, except for purposes of the contractual relations of the moment ; in fact, he often holds a very independent position.

Definition.— Agency is the relationship existing between two parties, who have agreed that one of them (the agent) shall represent the other (the principal), and so bring him into legal relations with a third party. In

other words, the duty of an agent is to bring his principal into privity of contract with the third party. He may make contracts on behalf of his principal, either naming his principal or just stating the fact of his agency, or even without disclosing the agency, providing he acts within the scope of his authority. Subject to what is said later, the principal will be liable on such contracts.

Formation.—Agency is brought about in various ways.

1. *Express.*—By express contract of employment, where A. agrees to act in a matter or series of matters, or generally on behalf of B. for a certain remuneration agreed upon by A. and B.

2. *Gratuitous by request.*—By an agreement in which B. asks A. to act for him gratuitously in a certain matter. A person acting gratuitously, unless his agreement to so act is by deed, is not bound, there being no consideration for his promise; nevertheless, B. must indemnify A. for loss, risk, or expense properly incurred in performing the service, and A. is bound to use such skill as he has in performing the duties which he thus takes upon himself.

3. *Implication.*—Agency may arise by implication in cases where, according to custom, a person, placed in a certain position, would be understood to act for and represent his principal; e.g. a factor, a partner, and in some cases a married woman.

Married woman.—It is often said that by marriage a woman becomes by implication the agent of her husband, but this is not so. *Prima facie*, goods supplied to the order of a married woman would no doubt be charged to her husband, but he would be within his

rights if he should refuse to meet the charge, unless he has by his conduct estopped himself from denying the implied agency ; *e.g.* if he has paid past accounts without complaint, he thereby ratifies and gives an implied consent as to the future. Once this implied authority be given it cannot be revoked without notice to tradesmen hitherto dealt with, but it may be revoked without notice as to parties not already dealt with. A married woman already supplied with necessaries, or with an ample allowance for necessary household expenses, cannot be agent by implication to pledge her husband's credit.

Master and servant.—The case of master and servant is very similar. A servant is not agent for his master unless in a similar way, by words or conduct, the servant is held out as such by his master.

Partners.—The best example of inherent authority is to be found in the authority of a partner to bind his co-partners and the firm in anything done by him in the partnership affairs.

4. *Agency by necessity.*—This is not true agency, but it is found in law in cases where the principal is not approachable, and something requires to be done for or to his goods or affairs ; in such case the person on whom the goods, property, or affairs are dependent is agent by necessity ; *e.g.* a master of a ship who, being unable to communicate with his owner, finds his vessel in danger from want of funds, may hypothecate the vessel for repayment of a loan so raised. A wife is in a similar position if she and her children are neglected ; *i.e.* she may pledge her husband's credit for necessary food and clothing for herself and children.

5. *Ratification.*—If A. makes a contract with B. on behalf of C., but without C.'s authority, C. may subsequently adopt the contract and relieve A. of his liability, subject to certain rules.

(a) The party arranging the contract must have done so in the character of and with the intention of acting as an agent for a known principal. This rule exists in order that a man shall not be able to escape liability on a contract by purporting to transfer it to another party at will under cover of agency. If the agent does not disclose the fact of agency, the contract may be enforced against him personally.

(b) The agent must have in his mind a principal at the time of entering into the contract. He cannot contract as agent in the hope of finding a principal who is willing to take up the contract. In such case, while he is liable to be sued upon it, the other party to the contract may repudiate.

(c) Besides being in mind, the principal must be in existence. This seems somewhat of a paradox, but it is easily explained, e.g. a person may make a contract on behalf of a company not yet promoted. In such case the company is in his mind, but it is not yet in existence. Promoters of a company previous to promotion, acting in the interests of the future corporation, act as principals and not as agents, for they cannot be agents of a non-existent principal. Hence a company on registration may take over any contracts of the promoters, made on its behalf, by way of assignment, but the company cannot ratify such contracts even though their articles of association purport to do so. Any outstanding contract carrying liability, though

supposed to be ratified, will, on winding-up of the concern, as in *Kelner v. Baxter*, recoil on the promoters and they cannot escape liability.

(d) Before a man ratifies he must be certain the act was done, and legally could be done, for his benefit; e.g. a bill may be accepted by X. for Y., and that acceptance afterwards ratified by Y.; but if X. indorses in Y.'s name with intent to defraud, i.e. forges Y.'s signature, such act is not done for Y., and Y. cannot adopt the signature as his own so as to relieve X. from the consequences of a criminal act (*Brook v. Hook*), but he may be estopped from denying the signature, if by any act he has led another party to believe the signature to be genuine.

Scope of agency—Torts.—Agency does not exist only as to contract, but the principal is liable for the wrongful act of his agent, if done within his authority in the business of his principal. Similarly, the principal may ratify acts of his agent, and so take responsibility for acts such as trespass. In cases of this kind the agent may be sued, or in the alternative the principal, but if the agent has to pay damages his principal may be bound to indemnify him. A principal is never responsible for wrongs done in excess of authority, e.g. X. a stationmaster arrested Y. for non-payment for carriage of a horse. Y. sued the railway company. Held, that X. had exceeded his authority as stationmaster, and though liable to Y., yet his principal (the railway company) was not liable.

Breach of warranty of authority.—If an agent has no authority and contracting as agent he represents that he has his principal's authority, he is not liable on the contract, since the other party never looked to him as

liable, neither can the principal be made liable if he refuse to ratify. The question then is, "Must the third party suffer?" At the least the agent has made a misrepresentation of fact, and he is responsible for the misrepresentation; e.g. X. accepts a bill for Y., and in so doing he represents that he has the authority of Y. to do so. At maturity Y. repudiates the acceptance. It has been held in *Polhill v. Walter* that X. is guilty of a "breach of warranty of authority," and can be sued for damages on account of such breach, he having warranted impliedly that Y. had authorized him to sign for him.

Capacity.—Any person may act as agent to another. An infant may be an agent, but his contract of agency with his principal will not be one of the contracts on which an infant is liable, unless it clearly be for his benefit.

Authority—Scope.—Sometimes a distinction in kind of agency is made, but as Sir William Anson points out, the difference in kind is rather a difference in the scope of the authority and not a difference of authority. A man agrees to act as agent for another, then, whether he has authority as to one act, or a series of acts, or a general authority, that authority is the same, but it is meted out to the agent in various quantities; e.g.—

1. I may employ X. as my agent to buy me a house in a certain county.
2. I may employ X. to buy a house which I can let for £50 per year.
3. I may employ X. to buy houses for me.
4. I may employ X. to buy me a house (containing six bedrooms, etc.), in a certain neighbourhood.

Many such examples might be given, showing the variation in amount of authority from the widest (3) to the narrowest (4).

Out of this variation of authority arises the division of agents into general and special.

"General" and "special" agents.—“General” agents are persons employed to act generally in a certain business ; they may do any act incident to that business unless they are limited by their principal. Even if limited, unless the person dealing with the agent is aware that the authority is so limited, the principal will be bound. “Special” agents, on the other hand, act within a limited authority, and cannot bind their principals beyond the scope of their authority ; e.g. a dealer gives goods for sale to B., his agent dealing in such goods (e.g. as in *Howard v. Sheward*, L. R. 2 C. P. 148). He asks B. to sell the goods but not to warrant them. B. sells and warrants them ; the principal, A., is bound by the warranty, as giving of such warranty is within the scope of a salesman’s general authority ; but if A. is a private person and B. is his servant, and B. warrants goods sold by him, against A.’s direct command not to warrant, A. is not bound, as B. had only a limited authority.

Authority—Attorney.—If an agent is to contract by deed his authority to do so must be given by deed. Such an authority is called a “power of attorney.” If, however, he does contract as agent by deed in his own name, by a curiosity of English law he is bound by his contract, and can be sued as if he contracted on his own behalf, and the principal cannot be sued. An agent, however, to sign under the Sale of Goods Act, may be appointed without writing ; as merely giving authority

to contract by way of sale gives an authority to sign a memorandum within the statute.

Rights and duties of principal and agent.—I. As between themselves.—The duties of the principal are to employ, to reward for employment, and to indemnify for loss or expense incurred during such employment, unless the loss was due to the agent's negligence.

(1) The agent has corresponding liabilities ; he must be diligent and avoid loss, always acting in perfect good faith. His duty to his principal is to act for his principal's benefit only, and not for his own gain or profit. As taking a reward from the other contracting party is not compatible with sincerity and zeal for his principal's welfare, such conduct is illegal, on the ground that his interest pulls against his duty.

If the giving of a reward comes to the principal's knowledge, he may recover the amount from his agent as if it were an abatement from the price paid on the contract ; e.g. if X., in consideration of £100 paid to him by Y., agrees to bring about a contract between his (X.'s) principal and Y., whether to the advantage of the principal or not, then, if payment of the £100 is made and the contract completed, the principal can sue X. for the £100. On the other hand, if Y. refuse to pay the money, X. cannot recover it by action. The principal can avoid any contract so tainted by his agent's illegal conduct.

(2) Again, it is an agent's duty to create privity of contract between his principal and a third party. Suppose, therefore, A., an agent, has goods of his own in stock, and as agent it is his business to bring his principal into contractual relations with persons dealing

in such goods, can A. supply his own goods to his principal without the latter's consent? The reply is simple; he may not do so, as his interest (obtaining the best possible price for his goods) conflicts with his duty (obtaining a contract of the greatest benefit to his principal). If an agent takes advantage of his principal in this way, the latter may ask for an account of profits.

There may, however, be a custom of trade which allows an agent to act as principal as against his principal, but in order to avail it must be a generally known one which the principal is aware of (*Robinson v. Mollett*).

Commission agents.—The above rule does not affect an ordinary commission agent, who is not truly an agent within our definition. He is more like a principal, viz. if he purchases, he pays the lowest price possible for the required quality, and sells to his employer, taking only commission and not selling to gain otherwise.

(3) Agents who are appointed to represent a man in a certain matter, must carry out the work themselves according to the maxim, *Delegatus non potest delegare*, i.e. an agent cannot delegate his authority, he is not allowed without permission to appoint a sub-agent to act for him. Usage of trade may allow delegation, as may also force of circumstances, or exigencies of a certain business. When under the foregoing circumstances agency is delegated, the sub-agent is directly the agent of the original principal, and is responsible to him for the proper carrying out of his duties; e.g. X. gives to his agent, Y., certain substances for analysis; Y. not being an analyst, may employ one, who will be X.'s agent for the completion of the contract. Similarly,

in the case of goods given to an agent for sale by auction, the agent has implied authority to employ an auctioneer to do the work. Of course, if an agent employs clerks or servants in the course of his business, such persons are not directly responsible, for any work apportioned to them, to the principal, if such is the course of business.

RESPONSIBILITY OF AGENT AND PRINCIPAL TO THIRD PARTIES

The liability of the parties depends on whether the fact of agency has been disclosed or not, and whether the agent has been named or not.

1. *Disclosed principal*.—Under these circumstances the agent, as a general rule, is not liable on a contract. His duty and liability end when he has brought his principal into legal relations with the third party. He may, however, be personally liable : (a) if he expressly contracts to take liability on himself ; (b) if there is a custom to that effect ; (c) if he contracts in his own name by deed under a "power of attorney" ; (d) if he is a commission agent for a foreign principal ; (e) if he has an interest in the subject-matter of the contract, e.g. an auctioneer, who has a lien for his charges on the goods sold, may sue for the price, and may be himself liable on the contract of sale.

2. *Undisclosed principal*.—If a party act in any matter for a principal, but fail to disclose the fact that he is an agent acting as such, the party with whom he contracts or incurs liability may look to the agent for completion of the contract or discharge of the liability. This is

right, since no other party was ever in the mind of the other contracting party. In addition to his ordinary rights on a contract, this party, whom we will call the third party, has, on discovering that there is an undisclosed principal, the right to sue him on the contract, alternative to his right to sue the agent. Thus if A. contracts with B. seemingly as principal, and he afterwards discloses the fact that he acted as the agent of C., none of B.'s rights against A. is lost, but he has a right against C., which if he elects to pursue, releases the rights against A., i.e. he may sue one but not both, and his election may be by words or conduct. On the other hand, either A. or C. can sue B. on the contract. If, however, the principal C. sues B. on the contract, he can only do so subject to B.'s right to set off any debt owed to B. by the agent A. This is the law, since in contracting with A., B. might well have in his mind the money owed by A., and it would not, therefore, be just if C. could step in and say, "This is my contract and not A.'s, and you must lose your set-off" (see *Rabone v. Williams*, 7 T. R. 360). This rule does not hold, however, if B. is aware that A. is an agent, even though A. fails to name his principal. There is a difference between non-disclosure of agency and disclosure with omission to name the principal.

If A. acts as an agent even though he omits to name his principal, he is not liable on the contract except as before stated. The distinction between unnamed principals and undisclosed agency is seen in a comparison of the two cases, *Armstrong v. Stokes* and *Irvine v. Watson*, 5 Q. B. D.

In the former case the principal was undisclosed,

the agent had received credit, and the principal had honestly settled with the agent. The agent did not pay the third party, and after default, on examination of the agent's books, the fact of agency was disclosed. The third party sued the principal, but it was held that, being undisclosed, credit was given to the agent, and the principal having settled with the agent did not need to pay again.

In *Irvine v. Watson*, the agent, who disclosed the fact that there *was* a principal but his name was undisclosed, had been paid and ought to have settled; he did not, became insolvent, and could not pay. Held, that the principal must answer for his agent's default and so must pay again.

3. *Non-existent principal*.—As we have seen, an agent acting as such cannot generally sue in his own name, but if he is in reality the principal in the transaction, he may declare himself to be such, and he may take up all the rights of a principal as against third parties, always provided he did not represent a certain party as his principal. If he represents A. as his principal without A.'s authority, he is guilty, as we have seen, of actionable misrepresentation or fraud unless A. ratifies. If he represents a fictitious person as his principal this is fraud. Hence the rule given applies only if he acts on behalf of "his principals" without naming them. If the other party discovers that there is no principal, he can sue the so-called agent on the contract, as in *Kelner v. Baxter*, L. R., 2 C. P. 174, in which case company promoters were held liable for contracts made for a non-existent company.

DETERMINATION OF AUTHORITY

Termination.—Agency may be terminated—1. By revocation by the principal, subject to the agent's rights and those of third parties. 2. By renunciation by the agent, subject to his principal's rights. 3. By completion of the object of the agency. 4. By death or lunacy of the agent or principal. 5. Bankruptcy of the principal.

If the contract of agency is for a fixed time, revocation cannot take place until the expiration of that time; or again, if the agent has an interest in the object of the agency, revocation would not be feasible. Similarly, renunciation is not good if a certain time is fixed in the original contract.

Rights of third parties must be respected; e.g. if X. gives Y. a general authority as his agent, and in that capacity Y. acts for a certain time, and then X. tells him privately that he revokes his authority, X. will still be liable for acts of Y. in the usual course of business, unless the third party is aware of X.'s revocation. A husband cannot revoke the authority which he has given his wife, without warning persons with whom she has previously dealt as agent for her husband.

Again, if X. employs Y. as a manager, and in that capacity certain acts are necessary, X. is liable for such of Y.'s acts, even though he expressly told Y. not to do such acts. The reason is, that if a person holds a position, the world thinks that person capable of all acts within the usual scope of his position, and commercial men contract with that person or with his

principal through him, on the strength of that supposition (*Edmunds v. Bushell and Jones*). In which case Y. had from his position authority to accept bills for X. X. revoked the authority but still employed Y. in the same position. A third party, without notice of the revocation, held X. liable on a bill accepted by Y.

Classes of agents.—There are various classes of mercantile agents : *e.g.* auctioneers, brokers, bankers, factors, commission agents, including *del credere* agents.

1. *Auctioneers.*—Auctioneers are agents with authority to sell their principal's goods *for cash*. The rules of agency given above apply to them. Their position is peculiar in that, on the hammer falling, they are for a time the agent of the buyer also, for purposes of signing the contract of sale or note to satisfy sect. 4 of Sale of Goods Act and sect. 4 of Statute of Frauds.

2. *Broker.*—A broker is an agent who is restricted by the rules of agency as modified by custom. The principal is, generally, taken to have authorized the broker to act according to the custom of his market. What is custom is a matter of evidence in each case. The broker has authority to sign a memorandum for both parties. This he does by means of "sold" and "bought" notes, *e.g.* (1) bought for A. from B., etc. ; or (2) bought for my principals from B. ; or (3) bought of you by me ; the corresponding "sold" notes are (1) sold for B. to A. ; or (2) sold for B. to my principals ; or (3) sold to you for me. Each example of note gives us a class of agency, *i.e.* (1) disclosed agency with a named principal ; (2) disclosed agency with unnamed principal ; and (3) undisclosed agency. Brokers generally negotiate between, and find, buyers and sellers, but

they may be employed by one party to find customers for them.

3. *Banker*.—Bankers are agents of customers and other banks for the collection of bills. They are also authorized to pay (on demand by cheque) their customers money, and to pay bills accepted by their customers payable at their bank, and to debit the customer's account with the amount.

4. *Factors*.—Factors are persons having goods of their principals for sale. They sell in their own name, as a rule, and unlike auctioneers may give credit. Factors often purchase on commission for their principals, and they have a lien on goods of their principal for any balance of account due from their principal. For authority of factors, see "Sale of Goods."

5. *Del credere* agents.—Certain classes of agents agree, as part of their contract of agency, to indemnify their principals for any possible loss which may accrue owing to failure of credit of any person with whom such agent makes contracts on his principal's behalf. Agents of this class are called "*del credere*" agents, and although their agreement savours of guarantee, strictly no writing is required, although it is prudent to have the contract in writing.

QUESTIONS

101. Define agency.
102. Mention the various ways in which agency may be brought about.
103. What is the position of married women in regard to agency on behalf of her husband?
104. State the rules in regard to the ratification of agency.

105. What is the extent of the liability of a principal in respect of the "torts" of an agent?
106. What is the position of the parties in the case of a breach of warranty of authority?
107. Distinguish between general and special agents.
108. Outline the rights and liabilities of principal and agent as between themselves.
109. Discuss the question of delegation of agency.
110. In what particular cases may an agent be liable, even though the principal be disclosed?
111. State the rules in regard to undisclosed agency.
112. How may the authority of an agent be terminated?
113. What special feature occurs in the agency of an auctioneer?
114. Explain the meaning of "*del credere*" agent.

PART III

MERCANTILE PROPERTY

CHAPTER XII

THE LAW OF MERCANTILE PROPERTY

Classification of Property—Debts—Bonds—Loans and Interest—
Taking Accounts—Guarantees, Continuing and Executed—
Discharge of Guarantee.

THE meaning of property may be considered in two senses : (1) the generally accepted meaning, *i.e.* actual things owned ; (2) the rights of a person who is the owner of the goods. This latter sense is the one in which the term is used most commonly in our subject.

Property, meaning goods or things owned, may be divided into two classes, viz. movable and immovable, and these two divisions very nearly coincide with the legal divisions—real property and personal property. Real property consists of all immovables, except leaseholds, together with certain rights which do not concern us, *e.g.* patents of nobility. Personal property consists of all movables, *e.g.* goods, as corn, money, furniture, documents representing money, together with leaseholds.

Mercantile transactions are chiefly concerned with that branch of personal property called movables, or

goods and chattels. Of course documents of title to real property are often given as security in commercial matters, *e.g.* to a banker to secure an overdraft.

Movable property is divided into two classes—things actually in possession, and things which can be brought into possession. These two classes are *choses in possession* and *choses in action*. Choses in possession are goods which can actually be handled and substantially enjoyed in specie, *e.g.* a horse, books, money. Choses in action are mainly rights to sue for money, documents creating such rights, *e.g.* bills, bonds, and notes, and in a sense the money recoverable (but this sense is not really good, as on recovery the money is in possession). Debts due to a creditor make the creditor an owner of a chose in action; annuities, stocks, shares in companies, policies of assurance, are all choses in action. There is a further class of chose in action not included above, not being tangible rights to certain sums, *e.g.* patent rights, copyrights, goodwill, trade-marks, and shares in partnerships.

The above is the classification which will be followed in the treatment of our subject, but the use of the word property in many cases will be the second one. In its second and legal sense, property is a bundle of rights which belong to a man in his relation to things. Property may be (1) absolute or general, (2) qualified or special, and the difference lies in the number of rights, and the quality of the rights in any man's bundle: *e.g.* a man owns a watch, and no one else has any right to it, this man has absolute property in his watch, *i.e.* he has a full bundle of rights, *e.g.* the right to wear, to break, to lend, to sell, and many others;

but it is evident if he pledges his watch he has parted with his right to possession, his right to break, to wear, etc., but he still has a qualified property or smaller bundle of rights, *e.g.* he may have a right to redeem or to restrain the pledgee from using the watch, and he certainly has the right to sell. He may, however, divest himself of all his rights by parting with his right to redeem.

Rights in property are transferred by certain contracts (*e.g.* sale and bailment), and by gift, but sale and bailment have been discussed under the head of commercial transactions. It may, however, be pointed out that sale gives as a rule absolute property; bailment only qualified property, *e.g.* passive right of an innkeeper to retain goods of his guest for payment of charges, and if necessary to sell for that purpose.

Under the head of commercial property it is proposed to review from a legal standpoint the most important choses in action, viz. negotiable instruments, debts, insurance, and such branches as are allied to choses in action, *i.e.* patents, design, trade-marks, and copyright. Debentures and shares in companies have been mentioned under "Company Law."

DEBTS

Debts.—Debts are sums of money, ascertained and liquidated in amount, due from one party called the debtor to another called the creditor. They arise out of a contract or quasi-contract, or out of the decisions of a competent court as evidenced by an entry on its rolls. The latter class consist in great part of what

are known as judgment debts. Debts arising out of contract may be evidenced either orally, by writing, or by deed under seal. Such debts as are not evidenced by deed or by a record of a court are called simple contract debts; those so evidenced are called specialty contract debts. The commonest of this latter class are generally those secured by a bond.

Bonds.—Bonds are instruments under seal whereby a person obliges himself to pay a certain sum of money to another person called the obligee of the bond. There are two ways of binding one's self: (1) by a single bond where the obligor simply promises to pay a sum of money; and (2) by a bond with a condition, e.g. X. binds himself to pay £100, but, if before January 1st he pays £50, the bond will be discharged. The object of such an instrument is to secure the payment of £50, and to do so the obligor is bound in £100 if he fails to pay (*see "Penalty"*).

The condition of discharge may not be payment of money, but the performance of services; but if money payment, as in the example, is the condition, the bond is called a "common money bond." In these bonds the sum of money expressed to be payable in event of failure of the condition is really a penal sum; penalties cannot now be enforced. Originally the whole sum could have been recovered, but since the constitution of the courts has undergone great changes by the Judicature Act, 1873, the penalty would not be enforced in any court. Instead the debtor would be required to pay the debt with costs and interest.

Loans at interest.—Interest charged on debts in the nature of loans is not now settled by Act of Parliament,

i.e. there is no statutory legal limit to interest. It may be high, but if charges for inquiry or other fees and interest are great, such facts go to prove the presence of undue influence ; and under the Money Lenders Act, 1900, the Court will relieve the borrower when the bargain made becomes what is called "harsh and unconscionable." The debtor is always liable to pay principal, but not costs and interest of an excessive character (*Earl of Aylesford v. Morris*, 8 Ch. A. 484). While the Court has an absolute discretion, it usually fixes the interest at £10 per cent. per annum.

Interest.—Interest is not at common law chargeable on a simple debt. In the case of an overdraft at a bank, a custom of bankers exists which a customer by his acquiescence accepts. But this custom is not implied if the banker is secured by way of mortgage, without any covenant on the part of the borrower to pay interest.

Interest at 4 per cent. per annum accrues on judgment debts recorded in the High Court, and in some of the inferior Courts of Record. Interest also runs on bills, notes, and cheques after dishonour, and on overdue bonds other than of a single nature.

TAKING ACCOUNTS

Before a party knows what is due from him to A., or to him from A., on a series of transactions, it is necessary that accounts be taken between them. This often occurs in case of a banking account. A trader constantly paying money in, and drawing on the

funds so paid in, sends his pass-book for entry to his banker; this is done, and a pencilled total shown in both credit and debit columns. The trader accepts this, makes no complaint, and is taken to have acquiesced or assented to the items contained therein. Such assent gives the pass-book the nature of a settled account. Perhaps the best example of a settled account is the half-yearly balance in the pass-book, which, if accepted without reservation, is good as against both banker and customer, and cannot be opened by them unless fraud can be shown to exist, or unless many of the items are tainted (*Blackburn Building Society v. Cunliffe Brooks & Co.*).

Accounts are of two kinds: (1) open, that is, no balance having been struck on either side; or (2) closed, settled, or stated, in which both parties have agreed as to the correctness of each item, and a balance has been struck as due from one party to the other. The Court will not allow a closed account to be opened unless there has been such an omission as to amount to a manifest injustice or fraud. In *Williamson v. Barbour*, 9 Ch. D. 529, accounts were shown to contain errors considerable in extent, both as to amount and number, and certain items which were held to be a fraud on the plaintiffs, and it was held that, whether caused by mistake or fraud, an account so vitiated would be opened even if of long standing. If, however, the items objected to do not affect the whole account, but can themselves be rectified, the party complaining is allowed on evidence to have only those items altered without opening the whole account. This altering is called surcharging and falsifying, meaning respectively taking

credit for an omission, and cancelling an item wrongly inserted.

GUARANTEES

It often happens that, to secure a debt or an overdraft from a banker, or to gain credit in a transaction, a person is required on giving a bond to do so with sureties. The instrument containing the contract of suretyship or guaranty gives the right of action against the surety on default of the principal debtor, and on this account it may be classed amongst choses in action. Although a contract it is so attached to the question of debts and payments, that it is perhaps better to treat of it here.

A guaranty is a good form of commercial security, depending for its value and utility on the solvency of the surety or guarantor. It is one of the contracts dealt with by sect. 4 of the Statute of Frauds, which enacts that :—

“ No action shall be brought whereby to charge a person upon any special promise to answer for the debt, default or miscarriage of another person, unless the agreement upon which such action be brought, or some memorandum thereof, shall be in writing, and signed by the party to be charged therewith or his duly authorised agent.”

Indemnity.—A guarantee is a promise to answer for the debt or default of another, made to a person to whom that other is indebted or is in the future to become indebted. Contracts of indemnity do not

come within the Statute of Frauds, and hence do not require to be expressed in writing. The difference between guarantee and indemnity is set out in the well-known leading case of *Birkmyr v. Darnell*, in which the following example was given : X. and Y. enter the shop of Z., and X. tells Z. to supply Y. with goods, and if Y. fails to pay, X. will be responsible. This is a promise to answer for Y.'s debt to Z., and must be in writing as a guarantee ; but if X. says, "Supply Y. with goods and I will pay or see you paid," we have no guarantee, but a promise to be primarily liable on the contract. In guaranty the surety is only secondarily liable, the claim being primarily against the principal debtor.

Contribution.—Where a debt is secured by the suretyship of two or more persons, and one surety is called upon to pay, then if he pays the whole or more than his proportionate share of the debt so secured, he has a right to contribution from each co-surety. If the surety be sued and judgment be given against him for the full amount, his right to contribution arises even before he satisfies the judgment. This rule is true in all cases, whether the co-sureties knew of the co-relationship or not ; that is, whether the parties became sureties by the same or different instruments, provided the debt guaranteed and the principal are the same. In no case can a co-surety be called on to pay more than the sum in which he is bound, but he will contribute with his co-sureties in proportion to his maximum liability, e.g. X. and Y. are bound in sums of £25 and £50 respectively, on behalf of Z., who makes default in payment of £50. X. could not be called upon to pay more than £25, although apparently Y. could be called

to pay the whole £50, but they will pay as between themselves in proportion to their maximum liabilities, i.e.

$$\begin{aligned} X \text{ pays } & \frac{2}{3} \text{ of } £50. \quad Y \text{ pays } \frac{1}{3} \text{ of } £50 \\ \therefore X \text{ pays } & £16 13s. 4d. \quad Y \text{ pays } £33 6s. 8d. \end{aligned}$$

Rights of sureties.—When a surety pays a debt on behalf of the principal debtor he has the rights of the creditor, that is, he can sue for the amount paid as an implied contract on the debtor's part to repay the money paid for his benefit, and claim the benefit of any securities held by the creditor. If a surety holds any security, this must be the common security for all sureties, although the co-sureties do not know of it at the time of entering into the contract, and hence could not be influenced by knowledge of the security (*Steel v. Dixon*).

Having all the rights of a creditor on paying the debt, a surety takes all bonds (held by the creditor as collateral security from the debtor). Previous to the Mercantile Law Amendment Act, 1856, such bonds were discharged where the surety paid the creditor, but they are now by the provisions of that Act good in the surety's hands as against the debtor. He also takes any other security in the creditor's hands.

A surety cannot compel a creditor to sue the principal debtor; but he may pay the debt, and as he takes the creditor's place, he may himself sue the debtor, or even bring an action to compel payment without first paying the debt, provided he gives a sufficient indemnity as to costs to the creditor.

A surety when called on to pay can always set-off

a debt owed by the creditor to the principal debtor, provided such debt arises out of the same transaction.

Not uberrimæ fidei.—Great care should be taken in cases of contracts of suretyship, as good faith is always required after the contractual relations are set up, although the contract in the making is not of the class known as "*uberrimæ fidei*." A surety has the right to demand to be informed of anything which would tend to damage his position or to give him a right to break his relationship.

Del credere.—Agents of the class known as "*del credere*" have, as a result of their contract of agency, to indemnify their principals against default of a third party with whom they contract. No written agreement to this effect is necessary, although the contract is practically one of guaranty, as the third party is primarily liable, and failing him, the principal requires the agent to be responsible for the loss.

Consideration.—In no case is it necessary to express the consideration in a written agreement of guarantee, so that in this respect the old case of *Wain v. Warlters* does not apply, being overruled by the Mercantile Law Amendment Act, 1856. Consideration of some sort must be present, and is essential to the validity of all contracts, unless, as in the case of a deed, it is excused on account of the formality of the contract.

If a guarantee be given as to the character, conduct, credit, or ability of a third party, the guarantee must be signed by the party to be charged, and an agent's signature is not sufficient to charge his principal on the guarantee (Statute of Frauds Amendment Act, 1828).

Kinds of guarantee.—There are two classes of guarantee: (1) continuing, and (2) executed; or (1) continuing, and (2) specific.

Continuing.—A continuing guarantee is one in which the consideration is divisible and supplied from time to time, *e.g.* to cover a varying or fluctuating account and to secure the balance ultimately due on that account at any time. Of such is the usual bank guaranty. Such a guaranty may be determined at any time, as to subsequent advances, by giving notice to the person advancing and paying sums already due. It is also determined by death of the surety, provided the creditor has notice of the same, unless an express agreement to the contrary exists. This right to determine may exist even if the guaranty is by deed. A continuing guaranty given by a partnership firm to a third party, or by an individual in respect of a firm, is revoked by a change in the constitution of the guaranteeing or guaranteed firm, such revocation only applying to transactions occurring after the date of the change.

Executed.—An executed or specific guarantee is one in which the consideration is executed once for all.

The word "executed" is not so good as "specific" in describing such guarantees, for a guaranty may be "specific" but not truly "executed," *e.g.* if it is given to cover a given undertaking or a certain advance, then on fulfilment of the undertaking or repayment of the sum advanced the guarantee ceases.

Fidelity.—Fidelity guarantees (*i.e.* guarantees as to the integrity or capacity of a person in a given office) are of this nature, although at sight they seem to be continuing guarantees.

The extent of a surety's liability depends on the nature of the guaranty. The liability on the latter class (specific) does not end with the surety's death, and his estate continues liable : see *Lloyd's v. Harper*, 16 Ch. 290, in which case X., on admission of his son to Lloyd's, wrote a letter engaging to be responsible for his son's engagements as a member of Lloyd's. It was held that the consideration being given once for all, the guarantee does not cease on the death of the surety X.

Discharge.—A surety has the right to be kept in the same position as between himself and other parties as he was on executing the contract of suretyship. If this position be altered to his detriment he is released. Hence if fraud was the means of securing the suretyship, it is discharged on general principles of contract. Again, the contract is discharged (1) by release of a co-surety if contribution is thereby lost ; (2) by the bond not being executed by all parties according to agreement, as in *Ellesmere Brewery Co. v. Cooper*, 1896, 1 Q. B. 375 ; and (3) by substitution of a new agreement with the debtor without the consent of the surety.

Release of the principal debtor by the creditor discharges the surety, unless the terms of the release preserve the right of the creditor against the surety, and the release amounts to a promise not to sue. In such case the surety can pay (since the debt is not discharged) and then sue the debtor. Since guarantee is to secure against the principal's default, discharge of the principal debtor by bankruptcy cannot be said to discharge the surety, or the value of the contract would be lost, nor can a resolution of creditors to take a composition discharge the surety. A binding contract

not to sue the principal debtor for a given time, however short, discharges the surety, since it prejudices his right to stand in the creditor's place and to sue, unless the creditor reserves his rights against the surety. Lapse of time under the Statutes of Limitation works release, time running from the date of the principal debtor's default, which in a continuing guarantee is difficult to fix. It should be noted that payments on account by the principal debtor do not keep the liability of a surety alive, as such payments are not made on behalf of the surety, and cannot be construed as an acknowledgment of the surety's liability.

QUESTIONS

115. Distinguish between real and personal property; and choses in possession and choses in action.
116. Mention debts upon which interest is legally chargeable.
117. What is the meaning of "taking accounts"?
118. Distinguish between guarantees and indemnities.
119. What is the position of a surety in regard to his co-sureties?
120. What is the position of a surety in respect of the principal debtor and creditor?
121. Distinguish between continuing and executed guarantees.
122. State the extent of a surety's liability.
123. Under what circumstances may a surety be discharged?
124. State the effect of the Statute of Limitations upon a surety.

CHAPTER XIII

NEGOTIABLE INSTRUMENTS

Distinction between Negotiable and Non-negotiable Instruments—Holder in Due Course—Bills of Exchange : Definition, Parties, Acceptances, Capacity, Case of Need, *Sans Recour*, Forgeries, Consideration, Accommodation Bills, Endorsements, Re-issue, Presentment, Payment, Dishonour, Liability of the Parties, Discharge, Alteration, Lost Bills.

PAYMENT of debts is often made by a transfer of a negotiable instrument, whilst some negotiable instruments are very closely allied to guarantees: e.g. guarantees often take the form of a joint and several promissory note, whilst an accepted bill gives a good example of the rights of suretyship, viz. the acceptor is the principal debtor, the drawer and indorsers being in the nature of sureties.

Generally speaking, any instrument which embodies a contract to pay money, and which may, by mere delivery, either with or without indorsement, transfer the legal right to the money, is a negotiable instrument. We may test an instrument by asking two questions concerning it :—

1. Can the transferee sue in his own name without notice to the party liable?

2. Does the transferee take the instrument in good

faith, and for value, thus making a good title, notwithstanding a flaw in the transferor's title?

Apply these tests to certain instruments—say, to a bill of lading and a bill of exchange respectively, and we find that the former, although not far removed from negotiation, is not fully negotiable. The transferee in such case, by the Bills of Lading Act, 1855, can sue in his own name, but he does not always take a title as above. The bill of exchange, however, answers both tests, being perfectly negotiable.

A comparison of non-negotiable and negotiable instruments will show the striking differences in the contracts contained therein.

NEGOTIABLE.

1. A negotiable instrument, like the money which it represents, may pass from hand to hand by delivery, or by delivery with indorsement.

2. Holder may sue without notice to the person liable to pay.

3. Transferee of a negotiable instrument is presumed to have given consideration : e.g. holder in due course of a bill of exchange.

4. Holder in due course takes free from equities, i.e. free from any charge upon the instrument, or any taint in title.

NON-NEGOTIABLE.

1. A contract in a non-negotiable instrument can only be transferred subject to a statute making it transferable: e.g. Policies of Assurance Act, 1867, and the Judicature Act, 1873.

2. Contracts assignable by Statute require notice by the assignee in writing (Judicature Act, 1873).

3. Onus of proof is on the party suing on the contract to show that consideration was given.

4. Assignee of an ordinary debt takes subject to equities, i.e. subject to any charges on the debt.

Holder in due course.—A holder in due course as

above mentioned means "A person who has taken a bill, complete and regular on the face of it, providing that he took it (*a*) before it was overdue, and without notice that it had been dishonoured, if such be the case ; and (*b*) that he took it in good faith, and for value, without notice of any defect in the title of the person negotiating it. 'Holder in due course,' according to Mr. Chalmers, is synonymous with the more 'cumbrous' technical legal phrase, '*bona fide* holder for value without notice.'"

Good faith.—Good faith within the meaning of the above definition is defined as covering acts done honestly even if negligently.

Negotiability—its source.—Instruments become negotiable in two ways : (1) By the *lex mercatoria*, or custom of merchants which is engrafted on the common law ; and (2) By Statute ; e.g. 3 & 4 Anne, c. 9, which made promissory notes negotiable ; and the Bills of Exchange Act, 1882, which did not create negotiability, but gave statutory force to the customary negotiability of bills.

Custom.—It has been affirmed that only ancient custom of merchants could create negotiability, but in the light of the decision of the Court in the case of the *Bechuanaland Co. v. London Trading Bank*, where debenture bonds payable to bearer were decided to be negotiable, it would seem that modern custom was to be reckoned with, and that the list of customary negotiable instruments was not finally closed ; hence in the future documents not now negotiable may be added to the list : e.g. bills of lading which are not negotiable may at some future time become fully negotiable. For commercial purposes, the most important negotiable

instruments at the present time are those dealt with by the Bills of Exchange Act, 1882, namely, bills, cheques, and notes.

BILLS OF EXCHANGE ACT

Bills.—A bill of exchange in the words of sect. 3 of the Act is “an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person or bearer.”

Parties.—The person giving such an order is called the “drawer,” who may be a single individual, a firm, or a company. The person to whom the order is addressed is called the “drawee,” who, on assenting to the order, is then called the “acceptor,” and the bill to which he now becomes a party is known commercially as an “acceptance.” The person for whose benefit the order is given is called the “payee.”

EXAMPLES

I.

£300.

Manchester, March 19, 1906.

(Stamp 3s.) Two months after date pay John Jones, or order,
the sum of three hundred pounds sterling. Value
received.

To MR. JAMES BROWN,
Salford.

EDWARD SMITH.

2.

 $\text{£}28.$

Manchester, March 1, 1906.

(Stamp 1d.) Pay on demand to Mr. William Brooks the sum of twenty-eight pounds for value received.

To E. SMITH,
Manchester.

JOHN BROWN.

3.

 $\text{£}1000.$

London, May 1, 1905.

(Stamp 10s.) Pay to Frank Smith 30 days after sight of this first of exchange (2nd and 3rd of even tenour and date unpaid) the sum of one thousand pounds.

To MR. W. SMITH,
Paris.

JOHN BROWN & Co.

4.

 $\text{£}40.$

January 1, 1906.

(Stamp 6d.) Pay to my order ten days after date the sum of forty pounds for value received.

To W. ROBINSON,
Leeds.

E. FRANK.

The sections immediately following the definition are explanatory of terms used in the definition. The most important points to be noticed are that—

1. The act to be done is payment of money, and the order of anything other than payment of money takes the instrument out of the definition: e.g. "Pay A. B. the sum of three hundred pounds, and deliver to him bonds in your possession," would not be a bill.

2. The order must be unconditional, but the Act

itself states that a direction to pay out of a particular fund is not "unconditional" within the Act; but a simple order to pay under any circumstances, together with a direction as to the account which the drawee may debit with the amount, or a statement as to why the bill was drawn, will not be construed as a condition.

Bills should be dated, and should specify the place where drawn and the place where the drawee is to be found. It is specially provided by the Bills of Exchange Act that omission on these points will not invalidate the document. If such bill comes into circulation any holder may insert the true date, and if whilst acting in good faith a mistake is made, and the wrong date inserted, that date shall stand, or, under any circumstances, if in the hands of a *bona fide* holder for value, the date shall be treated as if the real date of issue or acceptance. Similarly, "when a bill is wanting in any material particular, the person in possession has *prima facie* authority to fill up the omission in any way he thinks fit."

A bill is the embodiment in writing of a simple contract. In written contracts that the consideration must be in writing is the rule of English law; but bills are by the Act exempted, and are not invalid by reason that the value given, or even that value has been received, is not stated, for sect. 30 says that, "every party whose signature appears on the bill is *prima facie* deemed to have become a party for value;" hence the words "value received" are not necessary.

Bills in our law are of two kinds—inland bills and foreign bills. An inland bill is one which purports to be drawn and payable in the British Isles, or drawn within

the British Isles on some person residing therein. All other bills are foreign.

A bill may be drawn payable as follows : (1) "Pay to my order," in which case drawer and payee are one ; (2) "Pay to your own order," in which case "drawee" is in one capacity the payee.

On the other hand, a document drawn by a person on himself (*e.g.* a Manchester branch draws on its London house) may at the *holder's option* be treated either as a bill or a promissory note. The same is the case if a non-existing person, or, as it is termed, a fictitious person, is the payee. In such case, the instrument may be treated as either a bearer bill or a promissory note. We must, however, notice the wording of the section, which only makes provision for treatment by "*the holder*" as either a bill or note. A fictitious payee is constituted even if a bill is payable to a real person on the face of it, but in reality not intended to be paid to him at all. A banker will be protected in paying under a forged indorsement in case of the alleged forgery being that of a fictitious payee, even though the bill is not payable on demand ; *i.e.* if a bill is payable to Edward Smith, no such person existing in the mind of the drawer, the banker may pay even though the bearer purports to indorse in the name of Edward Smith (*Vagliano v. Bank of England*).

All bills in which the payee is not indicated with certainty are payable to bearer ; but where the payee, being real, is indicated, such bill is payable to that *person or order*, even though the order is not expressed in the instrument, unless transfer is prohibited by words as "pay D. only."

No condition is incorporated in a bill by providing, and it is quite valid to provide, for payment of interest or payment of the "sum certain in money" by instalments, with a provision that in default of one payment the whole shall become due. No extra stamp is required to cover the rate of interest stated in a bill.

Time.—A bill is payable on demand when it is expressed to be so payable, or when expressed to be payable at sight, or on presentation, or when no time is expressed. The same section states that if a bill be accepted or indorsed by any person when it is overdue, the bill will, with regard to such person, be deemed to be due on demand.

Bills are payable at a fixed and determinable future time when they are expressed to be so payable, *i.e.* at a fixed time after date or sight, or at a fixed period after date or the occurrence of a specified event, which is certain to happen, though the time of happening is uncertain; but time cannot be calculated in respect of events which may or may not happen, *e.g.* the arrival of a ship, the completion of a building.

A bill is not invalid by reason of its being ante-dated, post-dated, or bearing a date which is that of a Sunday. This clause in the Bills of Exchange Act saves the case of post-dated cheques, which thus have the value of a bill payable at a fixed and determinable future date. Such an instrument needs only a penny stamp, and cannot be impugned on the ground of contravening the stamp laws, as its due date would have arrived before any action would be brought, and an action on the cheque would be tried on conditions then existing.

Bills not drawn on demand are not payable when, on the face of them, they nominally fall due, but "days of grace" are added, and the bill falls due legally three days after it is nominally due. *E.g.* if a bill be drawn on the 1st January, payable three months after date, it becomes payable, not on the 1st, but the 4th April. If the last day of grace be Christmas Day, Good Friday, or a day appointed by royal proclamation, then the bill is payable on the preceding day. When the last day of grace falls on Sunday, the bill is payable the preceding day, unless that day be a bank holiday, when, and in all other cases of bank holiday, the bill is payable on the succeeding business day.

Case of need.—Sometimes bills contain on their face the name of a person to whom the holder may apply in case the bill is not accepted by the drawee, or in case of non-payment. The person so named is called a "referee in case of need," but a holder is under no obligation to resort to a case of need, unless, perhaps, he wishes to make a foreign drawer liable in the courts of that drawer's country.

Acceptance supra protest.—Before presentation to such referee the bill must be protested, or at least noted (*q.v.*). If the referee does accept or pay, he is said to accept for honour *supra protest* of any party liable on the bill, or for the person for whose account the bill is drawn. Such acceptance should be written on the bill like any other acceptance, and an indication that it is accepted for honour should also appear, signed by the acceptor. In absence of contrary intention, such an acceptor accepts for the honour of the

drawer. A bill due after sight is matured, counting from the date of noting for non-acceptance.

Acceptance for honour can only be resorted to if the bill is not overdue. In so accepting a referee engages to pay the bill according to the tenour of his acceptance : (1) if the drawee refuses to pay on presentment for payment ; (2) the bill must be protested for non-payment ; and (3) notice given to the referee. The acceptor for honour is in the position of a surety, and if he pays he has the rights of a surety against those for whose honour he paid. Rules as to presentment for payment to an acceptor for honour are similar in effect to those for presentment to an ordinary acceptor. Payment for honour must be attested by a notarial act of honour. When a bill is paid for the honour of a party to the bill, the payer for honour is in position of a surety who has paid his principal's debt, and as such takes the rights of the party for whose honour he paid, and any person liable to that party is liable to such payer ; but all parties subsequent to the person for whose honour payment is made are discharged.

Acceptance.—Returning to the acceptance of a bill, we find acceptance defined as the signification by the drawee of his assent to the order of the drawer. Until acceptance, the drawee is liable to no party on the bill, though he may be collaterally liable to the drawer : e.g. bankers are not liable in any case to payees of cheques in the event of their being wrongfully dishonoured. The acceptance must be written on the bill, and signed by the drawee. A signature, however, is quite sufficient without any other writing. Bills may be accepted whilst incomplete, as we have seen, or when

overdue, or previously refused, in which latter case maturity is calculated from the original presentment if due after sight.

Acceptances are either qualified or general, but no other act than a promise of payment of money can be taken as an acceptance.

The following are examples of qualified acceptances :—

1. Conditional ; *e.g.* payable on delivery of bills of lading.

2. Partial ; *e.g.* in a bill of £500 acceptance as to £250.

3. Local. Pay *only* at Parr's bank. Note well that "Payable at Parr's bank" is not qualified, but if such is on the bill it should be adhered to, although the holder *may* present elsewhere, *e.g.* acceptor's office, yet such behaviour might release the other parties on the bill.

4. Time.

5. Acceptance of some, or one, and not all drawees.

A person taking a qualified acceptance without the assent of the drawer or indorsers will release those parties. The reason being that he has agreed without the consent of all parties to vary a contract of suretyship ; hence a holder is right in refusing a qualified acceptance, and may treat the bill as dishonoured for non-acceptance.

The above applies unless the qualification is as to amount. Notice of qualified acceptance must be given, and if no dissent is expressed within a reasonable time assent is assumed.

CAPACITY

If a party can enter into a binding contract, that party can incur full liability on a bill. As an infant cannot enter into such a contract save for necessaries, he cannot be made responsible on a bill, even if given for the price of necessaries. He is responsible on his original contract, but not on the bill. If he accept a bill before coming of age, he cannot render himself liable (even though further consideration be given) by ratifying on coming of age. Where a bill is drawn or indorsed by an infant, or by a corporation having no power to incur liability on a bill, the bill does not thereby become bad, but can be enforced against any other party to it; *e.g.* if D., the infant payee of a cheque, endorse it to B., B. can enforce it as against Y. the drawer. As is seen by a study of the law of contract, a corporate body can in general only contract under its common seal, and even then cannot contract beyond its powers, or in matters outside the purposes of incorporation. Hence, railway companies, without special provision in their Act of Incorporation, cannot draw, accept, or indorse bills, even under seal. Chartered trading corporations, however, may issue and deal with bills; and companies, providing their documents of association under the Companies Acts, 1862-1900, allow it, may act similarly, since the Bills of Exchange Act expressly saves the enactments under these Acts. The Companies Acts provide that:—

“A promissory note or bill of exchange shall be deemed to have been made, accepted, or indorsed on

behalf of any company under the Acts, if made, accepted, or indorsed in the name of the company by any person acting under authority of the company, or if made, accepted, or indorsed by or on behalf of or on account of the company by any person acting under the authority of the company."

The seal may even yet be attached to a bill, but signature by procuration is as a rule adopted.

Signature per pro.—A procuration signature operates as a notice to the person taking it, that the agent has but a limited authority to sign, and the person taking such signature is put upon notice which requires him to see that the agent acted within his authority. If a *per pro.* signature is given, and the agent giving it had no power to sign, he is not personally liable on the bill, nor is his principal, unless he is estopped from denying liability. The agent will, however, be liable in an action for fraud, or "breach of warranty of authority" (*Polhill v. Walter*), and the damages would probably be the amount of the bill. Words showing agency are necessary if a person signs in the capacity of agent, but the single word "agent" is generally not sufficient. If the agent does not sufficiently indicate his agency, he is liable on the bill.

Sans recours.—Apart from agency, indorsers sometimes negative or limit their liability on a bill by such stipulations as "*sans recours*" (without recourse), "*sans frais*" (without cost), "to me" being understood. These expressions may also be used by agents, but the general form is: *p.p.* X., Y. & Co., J. Smith, Secretary.

Forgeries.—Forged signatures are inoperative, just as are unauthorized but otherwise innocent ones, and

no title can be given through such signature unless the person whose signature is in question is estopped from denying its genuineness. A person is estopped if by conduct he induces the holder to accept the signature as genuine. To be estopped means that the person in default cannot deny or take advantage of his own act. A banker paying on a forged indorsement cannot debit his customer unless the bill is drawn on him *as a banker*, and is payable on demand (*e.g.* a cheque), or the name of the payee is fictitious (sect. 7, sub-sect. 3).

Consideration.—Valuable consideration is required on a bill just as on any other simple contract, although it does not require to be expressed on the face of the written record. For purposes of the Bills of Exchange Act, the term consideration may include an antecedent debt or liability.

Where a person is in possession of a bill as holder, he is deemed to be "a holder for value" as against the acceptor and parties prior in date to himself, provided that value has at any time been given for the bill. A party holding a bill and deriving title through a "holder in due course" has all the rights of that holder. Mr. Chalmers gives the following example: If an agent has bills indorsed to him for collection, he can sue the acceptor or any person liable prior to his principal or indorser, but of course he cannot sue the indorser, as he (the agent) is not a holder for value.

Lien.—A person holding bills, and having a lien over them either by contract or implication of law, is a holder for value as to the amount of the lien. To the extent of his lien he may sue all parties, even though his transferor had a poor title, provided the

transferee took in good faith. If he recovers the full amount of the bill, he holds the funds, subject to his lien, as a trustee for his debtor.

Accommodation.—Accommodation bills may be treated at this point. An accommodation bill is one which has upon it the name of a person who has signed as drawer, acceptor, or indorser without receiving value, and simply for the purpose of lending his name and credit to another. A person acting thus is an accommodation party, and he is liable, just as any other party, to a holder for value, whether such holder knew of his position or not. He is really a surety, although the holder has recourse primarily against such accommodation party who has accepted; but the party accommodated impliedly promises to indemnify such acceptor if he is compelled to pay the bill, *i.e.* the accommodation party is on the face of it the principal debtor, having on payment the rights of a surety against the party accommodated; *e.g.* securities held by the creditor belong to him. An accommodation party is not liable until value is given.

Negotiation.—Bills may pass from hand to hand by delivery if payable to bearer, and by indorsement, completed by delivery, if "to order." If a bill is payable to "X. or order," and X. transfers to Y. for value without indorsing, Y. can require the negotiation to be completed by indorsement. Unless indorsed to Y., Y.'s full legal title is incomplete. Having been so indorsed, it does not legally require any further indorsement, although such may be asked for as additional security to a person subsequently taking the bill.

Indorsement.—Indorsements must be on either the

bill or the allonge (a slip attached to the bill) when the bill itself is full of indorsements. Part negotiation is impossible, and a man cannot purport to indorse over, say, £50 of a bill for £100. Indorsement is carried out by signing the name, using the same spelling as is used by the transferee, with or without the proper signature; *e.g.* a bill is indorsed to John Smythe or order; it must be indorsed "John Smythe" before negotiation, even though the indorsee is John Smith, and the spelling is a mistake. Bills payable to married women, *e.g.* to Mrs. John Brown, are endorsed Jane Brown, wife of John Brown; and to a newly married woman in her maiden name, *e.g.* Miss Jane Smith, are endorsed Jane Brown, *née* Smith.

Conditional.—Conditional indorsements are quite legal, but may be disregarded by the person paying; *e.g.* indorsement pay C. or order on completion of the X. school now building, could be read "pay C. or order."

Restrictive.—Restrictive indorsement prohibits further negotiation; *e.g.* pay X. only, pay X. for account of B. In each case X. is a *bona fide* holder, and can sue on the bill, but he cannot transfer his rights; if he does so, the party taking the transfer is subject to any defect existing in the title.

Blank.—If an indorsement is simply a signature, *i.e.* in blank, the bill becomes a bearer bill, but any holder may indorse specially to a specified person, converting such bearer bill into one payable to order. Blank indorsement may be converted into a special one by any holder; *e.g.* the signature John Smith is blank, and could be made special by writing above it, "Pay X. or order."

Reissue.—If a bill be negotiated back to the drawer, indorser, or acceptor, it may still circulate; negotiation by any of the above-mentioned under such circumstances is called “reissue.” Thus, if A. draws in B.’s favour on C., B. indorses to D., D. to E., E. to F., and F. again to B., then B. may reissue. But if B. reissue, he has only recourse against parties prior to his first holding, *i.e.* in this case against A. the drawer, and against C. if he has accepted. The reason is plain, for if B. had recourse against F. his transferor, F. against E., E. against D., and D. against B., this circuitous series of actions gets back to B. Hence, B. cannot sue E., F., or D., as each could then sue B. as a previous indorser, which would be absurd; in other words, B.’s new holding is taken to be a continuation of his first holding, intermediate transactions being of no effect. Reissue only takes place if the bill be not overdue.

Presentment for acceptance.—A bill should always be presented for acceptance, so that parties to it may be liable at once, before maturity, in case of refusal. The drawee cannot be liable on the bill if he dishonours by non-acceptance; he may be liable to the drawer for the consideration on which the bill was intended to be given, but that is another matter. In some cases it is not only advisable but necessary to present for acceptance, namely:—

1. Where the bill is payable after sight, presentment is necessary to fix maturity.

2. Where it is payable other than at the drawee’s residence or place of business, it must be presented for acceptance before it is presented for payment.

The penalty for non-presentment within a reasonable time is discharge of the drawer and prior indorsers. Presentment should be made to the drawee or his agent at a reasonable time during business hours, and before the bill is overdue. If the drawer be several persons, not partners, presentment should be made to all, unless one is commissioned to accept for all. If the drawee be dead or bankrupt, the bill may be treated as dishonoured, or presentment may be made to the personal representative or the trustee in bankruptcy, as the case may be.

Excuses for non-presentment.—The only excuses for non-presentment are those given above, and inability to find the drawee after reasonable diligence has been exercised. If want of funds is the reason for dishonour, there is no necessity to re-present, even though the first presentment be irregular. If a bill be left for acceptance, and not accepted before the close of next business day, it must be taken to be dishonoured, and the holder is entitled and bound (under penalty of loss of recourse against the drawer) to treat it as dishonoured, protesting it if it be a foreign bill, or noting it if an inland bill, if desired, but this latter is not requisite. A qualified acceptance, as we have seen, may be refused, and if no other acceptance is forthcoming, the bill is dishonoured by non-acceptance.

Payment.—A bill must be presented for payment on its due date, that is, the day it is legally due, or recourse is lost against the drawer and indorsers. If due on demand, *e.g.* a cheque, it must be presented within a reasonable time after issue, and what is a reasonable time is a matter of fact in each case. We may note,

however, that the drawer of a cheque is only discharged in certain circumstances ; as instance page 185.

A bill should be presented at the place specified in the bill, and to the person authorized to pay or refuse payment, e.g. a banker. If no place be specified, the acceptor's address is the place at which to present, primarily the business address ; but if unknown, his private residence, or if he cannot be found, presentment at his last known place of business is sufficient, and if no person there has power to pay, the payee or holder has presented in a sufficient way to charge the drawer. In case of an acceptor's death, presentment for payment *must* be made to the personal representative, since the deceased having accepted, his estate is bound.

Delay in presentment is excused if caused by circumstances beyond the control of the holder, and presentment is dispensed with in the following cases :—

1. Where, after exercise of reasonable diligence, presentment cannot be effected.
2. Where the drawee is a fictitious person, in which case *the holder* may treat the bill as a promissory note.
3. Where the drawee is under no obligation to the drawer to pay, the drawer is liable without presentment to the acceptor, and similarly an indorser will be liable on an accommodation bill, accepted to accommodate such indorser, without presentment to the acceptor.
4. A drawer or indorser may waive his right to have the bill presented to the acceptor, even after failure to present.

Where a bill is dishonoured, the holder has an immediate right of recourse against 'the drawer and indorsers, but he must claim that right by giving notice

of dishonour, or such indorsers or the drawer will be discharged. It is sufficient generally for a holder to give notice to his immediate indorser, who in turn will give notice to his indorser, and so on.

Notice.—If the party holding at the time of dishonour and the party to be made liable reside in the same place, notice should *reach* the latter the day after dishonour. If not living in the same place, notice must be *sent off* the day after dishonour, or if there be no available post, it must be sent the first post after that day.

Notice by an agent.—An agent has the same time in which to give notice to his principal, but he also has the option of giving notice to the party liable, in which case he must follow the ordinary rule. Notice may be verbal or in writing, and return of the bill is sufficient, but in any case the identity of the bill dishonoured must be clearly pointed out. Notice may be given to the agent of the party liable, to the personal representative of a deceased party, or the trustee in bankruptcy of a bankrupt party. If notice be *bona fide* posted, it is good, even though it miscarries in the post. The giving of notice will be excused in all cases where presentment is excused, and also in cases where the drawer has countermanded payment.

Protest.—Bills on their dishonour may be, and if foreign must be, protested in order to charge the parties. If protesting is not desired, the bill (if a foreign bill) must at least be noted, which is preliminary to protesting. Noting or protestation is carried out by a notary on the day of dishonour, if returned dishonoured by post, it is protested at the place where it is received;

if received outside business hours protest is effected next day. Noting is a formal minute on the bill itself, such as "no orders," "acceptance refused," "payment refused." A notary in protesting copies the bill in a formal document, which indicates the date, place of dishonour, person requesting the protest, and the answer returned; this document he signs. In the absence of a notary, any "householder or substantial resident" may protest according to a form given in the Act. Such last mentioned protest requires two credible witnesses to attest it. If a bill be protested after noting, the protest is dated according to the noting, and not according to protest.

Liability of the parties—Drawee.—In English law the drawee is not liable on a bill unless he accepts. He may refuse acceptance even though he has funds in hand, but in such case the drawer will have rights against him but not on the bill.

Acceptor.—The drawee by acceptance promises to pay according to the tenour of his acceptance, and so becomes the principal debtor. An acceptor cannot deny the existence of parties whose names were on the bill before he accepts, i.e. by his acceptance he is *estopped* from pleading the non-existence or non-genuineness of such parties.

Drawer.—In drawing a bill a party engages to indemnify the holder if the bill be dishonoured, provided notice of dishonour is given in due course. The drawer becomes (on acceptance by the drawee) a surety, who will be released by failure of the holder to take proper precautions.

Indorsers.—Indorsers are in a similar position to

the drawer, they guarantee payment, and are, like the acceptor, bound by all contracts on the bill at the time they endorsed. A person putting his name on a bill does so as a surety, and incurs the liability of an indorser by so "backing the bill."

Damages.—In case of dishonour the holder may recover from any party liable, *i.e.* the drawer, acceptor, or any prior indorser, and that party may recover from a party liable to him the following damages :—

1. *In England.* The amount of the bill with interest from maturity, or if on demand from presentation, together with expenses of noting, and (if a foreign bill) of protesting.

2. *Abroad.* The amount of re-exchange with interest from dishonour to settlement. Roughly speaking this would represent the sum which in England at the time of dishonour would purchase an amount of foreign money to discharge the bill with all necessary expenses of noting and protesting.

Discharge.—Payment in due course is the true and common way of discharge. The drawer may also pay without reissuing, and so discharge the bill, leaving the drawer all his rights against the acceptor unless he has none, the bill being accepted to accommodate the drawer. An agent being a banker paying a bill drawn upon him, payable on demand, gives a good discharge if he pays in good faith, even though he pays on a forged indorsement. We have seen that a bill coming into the acceptor's hands before maturity may be reissued, but if the bill be matured it is discharged if the acceptor holds it in his own right.

There are other ways of discharging a bill. Re-

nunciation of his rights by the holder can be validly made, either by delivering up the bill to the acceptor, or giving him a release *in writing*. Intentional cancelling also discharges a bill.

Alteration.—Material alteration of a bill without assent of all parties discharges the bill, except as against the person altering or assenting, and subsequent indorsers who are taken to assent. Alterations not apparent have no effect. Alteration of date, amount, time, place, or crossing would be material alterations.

Lost bills.—A drawer may be compelled to give a duplicate bill in case of loss, but the person applying is bound to indemnify the drawer against a reappearance of the lost instrument. Protest of a lost bill is carried out by means of a copy of the bill.

Bills in a set.—Foreign bills are often drawn in duplicate, or “in a set” of two or three. Each part of the set refers to the other, and the whole set forms one bill. One part only requires stamping, the other parts being free unless issued as separate bills. If so issued, the person issuing is liable on all parts issued, and the drawer is liable on each part which he accepts, if he, by accident, accepts more than one, and such parts get into the hands of different holders.

QUESTIONS

125. What is meant by a negotiable instrument?
126. Distinguish between a negotiable and a non-negotiable instrument.
127. Define a holder in due course.
128. Give a definition of a bill of exchange.
129. State the terms applied to the different parties of a bill of exchange.

130. Nixon and Co. draw upon A. Reader three months after date from December 1 for £130; make out a bill of exchange including acceptance.
131. Make out a promissory note for the above.
132. How does the circulation of an undated bill affect the instrument?
133. Define a foreign bill, and explain what is meant by "bills in a set."
134. Under what circumstances may a bill be treated as a promissory note or a bill?
135. A bill is dated on a Sunday; another is post-dated; what is the effect of these facts on the validity of the respective bills?
136. Explain what is meant by "days of grace"; and state when a bill is payable, should the last day of grace fall on a Sunday, and on a Bank Holiday.
137. Explain what is meant by "case of need."
138. What is the position of an acceptor for honour?
139. Define acceptance.
140. Distinguish between general and qualified acceptance, and give examples.
141. What is the legal position of an infant in regard to a bill?
142. State how a *per pro* signature concerns the parties to a bill.
143. What is the object of a *sans recurs* endorsement?
144. What is the position of a banker paying on a forged endorsement?
145. Discuss the question of consideration in regard to a bill.
146. Explain the meaning of an accommodation bill, and state the position of the accommodation party.
147. How may negotiation of a bill take place?
148. Distinguish between conditional, restrictive, and blank endorsements.
149. What is meant by the re-issue of a bill, and how does it affect the recourse of the parties?
150. What is the effect of non-presentment, within a reasonable time, of a bill for acceptance?
151. Mention cases in which presentment of a bill may be excused.
152. What course should be taken by the holder of a bill on its being dishonoured?

153. Explain the meaning of noting and protesting.
154. Discuss the liabilities of the parties to a bill.
155. State the damages that may be claimed on a dishonoured bill.
156. What is the effect of a material alteration to a bill, and state material alterations?
157. What action may be taken in the event of a bill being lost?

CHAPTER XIV

CHEQUES AND NOTES

CHEQUES : Definition—Essentials—Fictitious Payee—Dishonour—Delay in Presentment—Crossed Cheques—Not Negotiable Cheques—Protection of Paying Banker and of Receiving Banker.

PROMISSORY NOTES : Definition—Essentials—Presentment—Liability—I.O.U.'s.

Definition.—“A cheque is a bill of exchange, drawn on a banker and payable on demand.” No mention is made as to who is the drawer, but a banker’s draft will not come within this definition, as it is not within the definition of a bill given in sect. 3, nor can it be treated as a bill except by the holder under sect. 5, sub-sect. 2 (*q.v.*).

A cheque must have all the features of a bill of exchange. (*a*) It must be an unconditional order, *i.e.* it will not include instruments which demand the fulfilment of a condition as preliminary to payment, *e.g.* signing an attached receipt. Such instruments are legal, but they are not cheques nor even negotiable instruments, although the crossed cheques sections of the Bills of Exchange Act are extended to cover them by the Revenue Act, 1883. (*b*) We have already noted that there must be two parties, a drawer and a drawee, the latter being a banker.

(c) A cheque is payable on demand, and in general the time is not expressed, since under sect. 10 a bill is payable on demand if time is not stated.

Post-dating.—Remarks as to post-dating will be found under the head of the Stamp Act, but we may add that a post-dated cheque is legal as a bill; it is “not invalid by reason of being post-dated.” The name “cheque” does not, however, aptly describe such instruments, since they are not payable on demand, but only on arrival of the date on the face of the instrument.

Fictitious payee.—Sect. 7, sub-sect. 3, as to “fictitious payee” has been noted. Cheques are within this section, but it is open to question whether “impersonal payees,” e.g. a cheque drawn, “wages or order,” comes within the definition of a cheque payable to a “fictitious payee.”

Dishonour.—If a cheque be dishonoured, the ordinary rules in sect. 48 are to be observed as to notice, unless within sect. 50 there is no obligation on the part of the banker on whom the cheque is drawn to pay, because he has no funds, or the drawer has countermanded payment. The collecting banker as agent will, of course, give notice in all cases as required by the Act.

Delay in presentment.—Like other bills, presentment for payment must be made within a reasonable time, otherwise the cheque becomes stale. If not so presented, and the drawer suffers damage through the delay, he is discharged to the extent of his loss, and the holder becomes creditor of the banker, and is entitled to recover the amount from him. In a note to the Act Mr. Chalmers gives an example. “If A draws a cheque for £100 and the cheque be not presented within a reasonable time, then if the banker fail while

A is in credit more than £100, A is discharged, but the holder can prove in the banker's bankruptcy for £100."

In no other case has the holder or payee a hold over the banker, and the banker is under no liability to any person other than his customer. There exists a custom of marking cheques, which are then called "guaranteed" cheques. Some persons have claimed that they are then equal to an acceptance; but this is discredited by authorities, and the marking may be looked upon simply as a matter of comity, the banker thereby acknowledging that at that time he has funds to meet such a cheque.

If a customer's account be in credit and subject to no lien, the banker is bound to meet his customer's cheque unless his duty and authority to pay be determined by (1) counterman; (2) death of his customer coming to the banker's knowledge; (3) notice of a customer's act of bankruptcy; (4) serving a garnishee order on the banker and against the customer's account.

Sections 76 to 82 inclusive deal with the crossing of cheques. This is effected by writing the words "and company," or an abbreviation, between two parallel straight lines on the face of the cheque, or by drawing the lines without the words "& Co." The words "not negotiable" may be added to such a crossing. A cheque crossed as described is said to be generally crossed, and the effect of a general crossing is that the paying banker can only pay through a banker, that is a banker collects the cheque. A cheque may be also crossed specially by the addition of a banker's name to any of the above crossings.

Crossings may be added to a cheque by the drawer or any holder for value; but when once made, then, save as mentioned, they must not be altered or obliterated, as they are part of the cheque, and any alteration is a material alteration within sect. 64. A holder may, however, cross a generally crossed cheque, specially, or he may add the words "not negotiable" if not already on the document. There may be only one special crossing on a cheque, and a banker must refuse to pay if the cheque be crossed to more than one, unless the second crossing is to an agent, being a banker, for collection.

A banker paying a cheque crossed twice, or paying any crossed cheque other than to the banker to whom it is crossed, is liable to the true owner of the cheque if loss accrues. No remedy lies at the instance of the banker to whom a cheque is crossed, but only at the instance of the true owner.

"Not negotiable."—If a cheque bearing as part of its crossing the words "not negotiable," is negotiated after its title is tainted by theft, the holder has no claim on the drawer of the cheque in case payment is stopped and he cannot retain the instrument, hence suffering a total loss.

Paying banker.—Where a banker on whom a cheque is drawn and crossed generally pays it to a banker, or to the banker to whom it is crossed specially, in good faith and without negligence, he is protected; and if the payee has had the cheque in his possession the drawer is also discharged, and the banker is deemed to have paid the true owner.

Receiving or collecting banker.—The receiving banker,

if acting in good faith and without negligence, is not liable for receiving payment of a crossed cheque, if he receives according to the tenour of the crossing. In the *London, City and Midland Bank v. Gordon* it was held that a banker received payment for himself if he credited his customer's account with the amount of a cheque, before it was cleared, and hence would receive no protection. This decision is now reversed by the Crossed Cheques Act, 1906, which states, "A banker receives payment of a crossed cheque for a customer within the meaning of sect. 82 of the Bills of Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof."

"*Account payee.*"—Cheques are often crossed "account payee," but such crossing is not under the Act. The effect of such crossing is that the receiving or collecting banker has a direction as to the appropriation of the funds, and not that the mandate of the drawer to pay unconditionally is altered or restricted.

Limitations.—A cheque, though stale, is good as against the drawer for a period of six years from its issue, being a simple contract within the Statute of Limitations, and a banker with knowledge of his customer's solvency, and with funds in hand, would be justified in paying the cheque within six years, provided no bankruptcy has intervened. Bankruptcy, however, discharges all cheques as being debts provable in bankruptcy.

A cheque is not an assignment of funds in the hands of a banker, and the banker is not liable to the holder as he stands in the place of a drawee who has not

accepted. If the giving of a cheque actually transferred funds, a banker would be bound to pay part of a cheque if he had some but not sufficient funds available to pay it all; but this is not so, and the banker will refuse payment if the funds will not cover the whole cheque.

PROMISSORY NOTES

The third class of instruments dealt with in the Bills of Exchange Act, 1882, is promissory notes.

The definition in the Act is : "A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money to, or to the order of a specified person, or to bearer."

Such a note might be couched in the following terms :—

£500. Manchester, March 7, 1906.
(Stamp Two months after date I promise to pay Mr.
5s.) John Smith or order five hundred pounds.
TOM JONES.

There must be two parties to a note, *i.e.* the promisor and the payee; hence if a person makes a note promising to pay self or order, such a document is not a valid note until it is indorsed by the maker.

The Act further declares that a note is not invalid because it contains a pledge of collateral security, with an authority to realize on the same.

Except as to sections dealing with acceptance, sets

of bills, and the manner of drawing on the drawee, notes are governed by the terms of the Act as they apply to bills.

Unlike bills, notes may be made by two or more joint makers, who may, at their option, make themselves either jointly or jointly and severally liable, *e.g.*—

“We promise to pay,” etc., signed J. C. and E. F., makes J. C. and E. F. jointly liable but not severally.

“I promise to pay,” etc., signed J. C. and E. F., is a joint and several note, and J. C. and E. F. are severally as well as jointly liable on it.

As to presentment for payment, there is little difference between a bill and a note. Since a debtor is always bound to seek his creditor, no presentment is necessary to make the maker of the note liable, unless a place for payment is specified in the note. Under any circumstances an indorser will be discharged by failure of the holder to present at due date or within a reasonable time if payable on demand. As we have seen, an overdue bill is taken by the transferee, subject to any defect in the title of his transferor; but the transferee of a note takes it free from defects of which he has no notice, even though a reasonable time has elapsed since its issue.

Liability of Maker.—By making a note the maker engages to pay it according to its tenour, and he cannot deny to a holder in due course that the payee was in existence at the making, nor can he deny the payee's right and capacity to indorse.

We have seen that the provisions of the Act as to bills apply with modifications to notes, and in applying these provisions we view the maker, as primarily liable

to pay, in the light of an acceptor of a bill ; the first indorser on a note corresponds with the drawer of an accepted bill, payable to the order of the drawer.

I.O.U.—An I.O.U. is not a negotiable instrument, it is simply evidence of a debt. If, however, such acknowledgment imports a promise to pay, it must be drawn on stamped paper as a promissory note, which it virtually becomes.

Manchester, December 1, 1906.

I. O. U., Arthur Reader, the sum of £50 (fifty pounds).

ALFRED NIXON.

QUESTIONS

158. Define a cheque, and state its essential features.
159. State the law in regard to post-dated cheques.
160. What may be the effect of delay in presenting a cheque?
161. Distinguish between general and special crossings.
162. What is the effect of adding "not negotiable" to a crossed cheque?
163. What is the position of the paying banker and also of the collecting banker as regards crossed cheques?
164. What is the meaning of crossing a cheque "a/c payee"?
165. What effect has the statute of limitations upon a cheque?
166. Define a promissory note, and state how it differs from a bill.
167. What is an I.O.U., and when would it need stamping?

CHAPTER XV

POLICIES OF ASSURANCE—CHIEFLY LIFE, FIRE, AND MARINE

Points in Common—Life Policies : To whom payable, Insurable Interest, Effect of Suicide, Assignment, Lien—Marine : Definition, Underwriters, Risks, Assignment, Kinds of Policies, Loss, Salvage Claims—Fire Insurance : Interest, Indemnity, Assignment.

General Definition.—A policy of insurance is a mercantile document whereby one party, called the assuror, in consideration of a sum of money down, or by annual or other instalments, agrees to pay to another party, called the assured, a sum of money in case a certain event shall not happen or happen, as the case may be, and so causing a loss to the assured.

The sum paid by instalments as consideration is called the premium. Policies of assurance or insurance are taken out against many kinds of losses: *e.g.* accident, death, fire, shipwreck, capture in war, etc. The chief of these are life, fire, and marine insurance.

Points in common.—All these classes have points in common, some of which are set forth below:—

i. Every contract of insurance is a contract *uberrimæ fidei*, *i.e.* a contract which in the making is evidenced on both sides by perfect good faith, and full disclosure

of every material fact or circumstance likely to influence the position of the parties. Like fraud (*q.v.*) in an ordinary contract, non-disclosure of facts, or misrepresentation of facts not amounting to fraud, may vitiate the contract, and entitle the other party to repudiate the contract. Even honest misrepresentation renders a marine policy voidable, without an agreement to that effect; and where, as part of the contract of life insurance, a statement is falsely though honestly made, the contract is voidable if it is a term of the contract that the statement is true.

2. Every person insuring against a risk must have an insurable interest in the thing or risk insured against. If he has no insurable interest, the policy is void, as being in the nature of a wager.

Indemnity.—Life insurance is not an example of insurance indemnifying for loss; but if the assured had an insurable interest on the life of the person whose death is insured against at the time of taking out the policy, he can recover, in spite of the fact that he suffers no loss by the termination of the life, for the Act of 1774 (14 Geo. III. c. 48) forbids insurance of lives or events in which the person has no interest *at the time of effecting the insurance*. A man can only insure to the amount of his interest even in life assurance; *e.g.* if X. owe Y. £1000, Y. can insure himself against the death of X. to that extent. If X. before his death pays Y., Y. can still recover on the policy, although his insurable interest is gone (see *Dalby v. India and London Life Assurance Co.*).

Marine and fire assurance are pure contracts of indemnity, therefore no greater amount can be recovered

than the amount which represents the actual loss suffered by the event insured against occurring, whatever may have been the amount insured for.

Gaming and wagering.—Gaming is illegal, but all wagering is not necessarily so. If, however, a wager is to be legal, it must be one which the law has sanctioned. Insurance is purely a wager, but the law has sanctioned it by excepting it from the general rule, provided the assured has an insurable interest.

LIFE POLICIES

A life policy is an undertaking that, in consideration of premium named therein, the assuror (generally a company) will pay a certain sum of money on the death of a specified person.

Endowment.—Sometimes such insurance is an endowment policy, that is, payable at the age of 45 or 50, or some other age, or at death, if that occurs before the age agreed on. When a company agrees to add to the policy money a proportionate part of the profits, such part is termed a bonus.

To whom payable.—Except as above, the person to whom the proceeds of a policy of insurance is paid is the executor or administrator, provided the policy was effected on the testator or intestate's own life for his own benefit. Life policies are frequently deposited either with a banker or as security with creditors, or assigned by the person insured. In such cases, at the death of the insured, the proceeds of the policy would be claimed by and paid to the persons holding as assignees, provided the requisite formalities of notice

of such deposit or charge has been made to the insurance company. But if a party effects a policy on a life in which he has an insurable interest, the party effecting the policy or his assignee receives the money on the termination of the life.

The Act of Geo. III. (1774) enacts that a person must have an insurable interest *at the taking out* of the policy, and the name of the person for whose benefit it is made must be inserted in the policy. Further, the party insured can draw no greater sum than the amount of his insurable interest at the time of insuring ; *e.g.* a creditor may insure his debtor to the extent of his debt, but no further, hence it would seem to be a policy of indemnity, but this is not so, as the policy is still good, even though the debt is paid and the insurable interest gone. A creditor insuring his debtor with two companies cannot recover more than the amount of the debt, but in payment of this amount the two companies are entitled to contribution, *i.e.* if the amount is recovered from one company, that company may demand payment *pro rata* from the other.

Insurable interest.—A person has an insurable interest if it is evident that pecuniary advantage accrues to him by the continuation of the life insured. This right exists where a party has an undischarged pecuniary claim, such as the legal right to support. Hence a wife may insure her husband, but a husband having no such right, there is nothing in the law which gives him an insurable interest in his wife's life, nor has a parent any insurable interest in the life of his child, except so far as allowed under the Friendly Societies Acts. Other circumstances than relationship, however, may

make policies on the life of a wife or child perfectly valid.

Every person has an insurable interest in his own life to an unlimited extent, and so long as acting in good faith he can effect a policy to any amount.

An "indisputable policy" is one which can only be disclaimed on the ground of fraud.

Under the Married Women's Property Act, 1882, sect. 11, a married woman may effect a policy on her own, or her husband's, life for her separate use. Further, a husband or wife may effect a policy on his or her own life as a kind of settlement for the benefit of wife, husband, or children. Such settlements will not be subject to the assured's debts unless intent to defraud creditors is shown.

Suicide.—Suicide has various effects on policies of insurance. If the suicide is of unsound mind, the policy is not void, unless it contains a condition voiding it on suicide; but the policy is entirely void if death is due to *felo de se*, or if the life insured is ended as a capital penalty. If the life insured is ended feloniously by the party for whose benefit a policy is effected, the policy is void as to the benefit of the person committing the crime, but the proceeds would be paid to the deceased's legal representative.

Writing and Stamping.—By the Stamp Act, 1891, policies of assurance must be in writing, and executed and stamped within one month of receipt of any premium.

Assignment.—Although the person for whose benefit a policy is effected must have an insurable interest, the policy may be assigned by indorsement under the

Policies of Assurance Act, 1867. The assignee requires to have no interest, yet he may sue on the policy in his own name, provided he gives notice of the assignment to the company insuring. The assignee takes subject to all equitable claims of which he has notice at the time of his assignment, and priority is given as between the company and assignees to the several assignees according to date of notice.

Lien.—It is often said that a person has a lien on the policy which he prevents from lapsing by paying premiums before they are overdue. This is not so. A stranger can only obtain such lien by express contract, and not by implication of law, unless the person claiming such lien is a mortgagee, trustee, or third party, acting at the instance of the trustee in order to save the mortgaged or trust property.

MARINE INSURANCE

This is the oldest and most important form of insurance from the point of view of commercial law.

Definition.—A policy of marine insurance is a contract in which the insurers or underwriters, in consideration of certain premiums, agree to indemnify the assured against loss or damage from perils of the sea. Losses insured against may be losses of ship, cargo, or freight, or loss of any interest arising out of these.

Underwriters.—Underwriters are persons agreeing to indemnify for loss up to a certain amount, and several of these may be responsible on the same policy on account of the tremendous risk that one would be liable to if he undertook to find the whole sum in case

of total loss. Marine insurance, like fire but unlike life, is a contract of pure indemnity, and if the full amount of loss be recovered against one of several underwriters, the others are discharged as to the assured, but they contribute *pro rata* to the one who has paid in full.

Marine Insurance Act, 1745.—By the Marine Insurance Act, 1745, "No insurance on a British ship, or goods on board such ship, is valid if the insurer has no insurable interest in the vessel or goods. This interest must be present at the time of loss, but not necessarily at the time of insurance. This holds good since the contract is one of indemnity, and if a party has no insurable interest, he has suffered nothing in case of loss, and hence could not be indemnified."

Reinsurance.—Once having taken up the position of insurer, an underwriter has an insurable interest in a ship or its cargo, and he may reinsure with another underwriter.

Risks.—The usual risks in a marine policy are, "perils of the sea," fire, barratry, capture in war, jettison, restraints of kings, princes, and people, pirates.

Perils of the sea.—Perils of the sea include all accidents caused by perils peculiar to a ship at sea, or to the sea itself, as distinguished from perils common to sea or land, wear and tear, or the ordinary action of wind and waves. *Barratry* is the fraud of a ship's master or crew, and *Jettison* is voluntarily throwing goods overboard to lighten the ship, in case it should be necessary for its safety.

A broker is frequently employed to effect a policy.

The broker is liable by custom (although only an agent) for the payment of premiums, and on this account the broker has a lien on the policy until such premiums are paid by the assured.

The informal memorandum of the terms of the policy is first drawn up and initialled by the underwriters. Commercially this "slip," as it is called, is quite complete as a contract, but legally it is not binding on account of the informality. A policy must be issued, and by the Stamp Act, 1891, the contract is invalid, unless a policy in writing exists, duly stamped, specifying the risk insured against, the sums assured, and the names of the underwriters.

Assignment of a policy.—Policies of assurance are assignable under the Policies of Marine Insurance Act, 1868. The assignee takes by indorsement, and can sue in his own name, but he can only take if he has an insurable interest, and then he takes subject to equities. If, however, the risk insured against has happened, the policy moneys are now due, and the policy can be assigned even to an assignee without interest, just as any other debt is assigned. If the risk never commences, premiums paid can be reclaimed; but once the risk has commenced (*e.g.* vessel sails), no claim for return will be entertained.

Kinds of policies.—Policies are classed as voyage policies, time policies. A voyage policy is one effected on a vessel for a certain voyage, or a series of voyages. A time policy is effected on a vessel for a given time, but policies are also issued for voyage and time, *e.g.* "between Holyhead and Dublin for twelve months."

A time policy must not exceed twelve months,

unless a continuation clause is inserted under the Finance Act, 1901, which enacts that "in event of a ship being at sea or on a voyage at the expiration of the policy, the ship shall be held covered by the policy until its arrival in port, or a reasonable time thereafter, not exceeding thirty days.

Vessels in building can be insured under a marine policy, but by the Revenue Act, 1903, the time limit of twelve months does not apply.

Valued and open.—Policies may either be valued policies or open ; the former are policies in which the value of the subject-matter of the contract is inserted in the policy, the latter are policies in which the value of the thing is not stated, but is to be proved at claim.

Loss.—The loss on which underwriters are called to pay may be (1) a partial or average loss, or (2) a total loss.

1. *Average loss.*—(a) If goods are washed overboard, or accidentally lost, or any damage is done accidentally, the owner of those goods or the vessel bears his own loss. Such a loss is called a particular average loss, since the particular owner is the sole sufferer. (b) If in order to lighten the ship, and so conduce to the safety of the ship and cargo, a portion of the cargo be jettisoned, a general average sacrifice is said to be made. The party whose goods perish suffers a general average loss, but since his loss benefits the general body of owners of ship and cargo, such owners must contribute in proportion to the value of goods saved. The contribution is called a general average contribution, and even though a person insured

suffers no actual loss, the underwriter must indemnify him for general average contribution. Questions as to average contribution are settled by experts, called average adjusters. If X., Y., and Z. send goods in A.'s vessel which is in peril, the master may sacrifice some of X.'s goods to save the ship and remaining cargo. But Y., Z., and A. must contribute to X.'s loss. Now if X., Y., and A. are insured against loss, and Z. is not, X., Y., and A. can recover the amount contributed, but Z. (although actually losing no goods) must lose his contribution.

Average contribution can only be claimed if the ship completes her voyage safely, *i.e.* the sacrifice is effective, if the sacrifice conduced to this safety, and the goods sacrificed had been properly stowed, and were not on account of improper loading a menace to the vessel.

2. *Total loss.*—Total loss may either be actual or constructive. (*a*) Actual total loss means a loss beyond repair; *e.g.* where a vessel founders in deep water, or is broken up on rocks, or is blown up. (*b*) Constructive total loss occurs where it is, from a business point of view, unreasonable to expect that the subject-matter of the contract can be reclaimed and restored to its normal condition. It must be impracticable to attempt to restore on the ground that the damage done is so great that no reasonable man of business, even if uninsured, would incur expenditure required to restore it; *e.g.* where a vessel is stranded at some remote and dangerous place, and appliances for repairing and re-floating are not available.

If an owner claims for a constructive total loss, he

is bound to renounce all his rights to recover the vessel, and to give notice of such renunciation within a reasonable time.

Salvage claims.—Underwriters are also liable to compensate the assured if he is called upon to pay salvage claims to salvors of his vessels. Salvage is the compensation payable by the owners to persons who without any legal compulsion or duty have been the means of rescuing ship, cargo, or lives from the sea or an enemy. Such persons have a lien on the ship and cargo for the amount due as salvage.

Briefly summarized, the characteristics of the contract are—

1. The utmost good faith is required ; and
2. That it is a contract of indemnity.

The meaning of the term that the contract is one of indemnity is primarily that the person insuring must really have had something at risk, and is to be reimbursed the actual loss he suffers.

Because it is a contract of indemnity, rules have been formed—

1. Requiring interest.
2. Against double insurance.
3. Full disclosure necessary.
4. Subrogation.
5. For return premium.

But owing to custom of valued policies, indemnity may be greater or less than real loss.

Formal and statutory requirements—

1. Written or printed policy.
2. Stamp.
3. Policy must be signed or sealed by insurer.

The policy must specify—

1. The name of the assured or his agent.
2. The subject-matter insured, and the risk insured against.
3. The voyage and [*or*] period of time covered.
4. The sum or sums insured.
5. The names of the subscribers or underwriters.

Who may insure—

Every one who has an insurable interest, *i.e.* who will benefit from its existence, and suffer by its destruction, may insure.

The ideal is absolute ownership ; but all who assume relations of responsibility, or relations of risk of profit, and [*or*] loss, may insure.

FIRE INSURANCE

Interest.—In the case of fire insurance there must be an insurable interest in the property, both at the time of insurance and at loss. For this purpose insurable interest is a right in the property which may be lost if such property is destroyed by fire; *e.g.* the owner of a house has an insurable interest in it, as has also the lessee, each to the extent of his respective interest.

Indemnity.—A fire policy is in all cases a contract of indemnity, and the assured cannot recover more than the amount representing his actual damage, *i.e.* the actual damage to his interest, not necessarily the damage to the thing itself.

Assignment.—Policies of fire assurance do not

become assignable by any special statute, but they are assignable under the Judicature Act, 1873, subject to the terms of the policy, and provided the assignee has an insurable interest. When property the subject of a fire policy is sold, the policy (if in the ordinary form) does not pass to the buyer without the consent of the company, and if, after the contract is completed, the object is destroyed by fire, the seller being paid, he may not receive the insurance money, for he has lost nothing, and so requires no indemnity. The buyer in such case bears the loss. If the buyer has entered into a contract to purchase, he is bound to pay whether the building is there or not, and if the seller had recovered the insurance money, he must reimburse the company.

QUESTIONS

168. State points in common with the various contracts of insurance.
169. Name the classes of insurance that are contracts of indemnity, and explain the term.
170. What is the meaning of an endowment policy?
171. To whom is the proceeds of a life policy payable?
172. What is the meaning of insurable interest, and give instances of such interest?
173. State the effect of suicide on claims under insurance policies.
174. What is the position of an assignee under a life policy?
175. Discuss the question of lien on a policy.
176. Define the contract of marine insurance, and mention the losses that may be insured against.
177. Explain the terms—barratry, jettison, slip.
178. Describe the various classes of marine insurance policies.

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179. Distinguish between particular average and general average.
180. What is meant by actual total loss and constructive total loss?
181. Explain the meaning of "salvage," and state the position of salvors in regard to the same.
182. Discuss the question of the assignment of fire policies.

CHAPTER XVI

PATENTS, COPYRIGHT, TRADE-MARKS

Patents : How obtained, Remedy on Infringement—Copyright : Books, Lectures, Designs, etc., Remedies—Trade-marks—Trade Names.

PATENTS, copyright, and trade-marks are classes of property of modern creation. The two former are granted in order that a man may enjoy the benefits of his labour and ingenuity, and at the same time give his work to the public without fear of another gaining at his expense. The latter are allowed in order that goods sold may be known by a distinctive mark, as the goods of a certain person or persons.

Patents.—Patent rights are privileges, granted by letters *patent* (*open* letters to be read by all the King's subjects), to the first inventor of a new contrivance in manufacture. These privileges entitle the inventor to the sole and exclusive right of making, using, exercising, and selling his contrivance within the United Kingdom and the Isle of Man, for a period of fourteen years, which, on petition to the Privy Council, may be extended for a further period of seven years, and in very exceptional cases fourteen years.

A man may protect either the article produced or a new mode of producing that article, but in no case

may he protect a principle which he has discovered, although he may protect the methods of utilizing the principle, or the objects produced by the use of the principle; e.g. Röntgen rays are a philosophical principle and cannot be patented, but apparatus to utilize their effects can be the subject of a patent right.

Patent law is governed by various Acts of Parliament, extending from 1883 to the present day, and known as the Patents, Designs, and Trade-marks Acts. Under these Acts, patents are granted by the Crown through the agency of the Comptroller-General of Patents, who has power to grant and seal the letters patent.

Patents, how obtained.—Application for a patent must be made and lodged at the Patent Office, with a specification explaining the contrivance fully and completely, in such detail that an ordinary reasonable man accustomed to the work could follow the description and produce the article specified.

If, on investigation, the object or means of attaining it have not been the subject of a specification within fifty years, the patent when granted will not be deemed to have been anticipated, even if afterwards discovered in a specification more than fifty years old. Patents may be assigned, and licences to make, sell, and use are granted by the patentee by deed, enrolled on the register kept at the Patents Office.

Remedy on infringement.—If a patent be infringed the person infringing is liable at the instance of the patentee to an action for damages; or in the alternative, an account of profits derived from the infringement, together with an injunction restraining the infringement.

If a patent be not worked to meet the reasonable requirements of the public, then the Privy Council may order the patentee to grant licences to work, or alternatively may revoke the patent. This rule of the amending Act of 1902 was intended to stop the taking out of patents by foreigners without any intention of working them, which conduces to restraint of trade and stultification of British industry.

COPYRIGHT

The law of copyright is governed by various Acts, and like patent right, gives the originator a term of years in which he has the sole right to direct the production or dispose of his own work.

1. *Books, etc.*—The Copyright Act, 1842, gives to the author the sole right of producing, printing, and publishing books, etc., for forty-two years from publication, or for the term of his life and seven years after his death, whichever is the longer. This right may be assigned, and passes as personality on death.

2. *Lectures.*—The Copyright Act, 1835, gives to the author the sole liberty of publishing any lecture which he may deliver, if two days' notice in writing be given to two justices exercising jurisdiction within five miles of the place of delivery.

3. *Drama.*—Dramatic Copyright Act of 1833 gives to the author of a dramatic piece the same rights as are given by the Copyright Act, 1842, in the case of books.

4. *Art.*—(a) Engravings Copyright Acts, 1734 and 1766, give the designer a right for twenty-eight years, if his

name appears on each copy. (b) Sculpture Copyright Act, 1814, gives a similar right for fourteen years on similar condition, renewable in the original designer's lifetime for a further period of fourteen years. (c) Fine arts come under the Copyright Act of 1862, which gives the artist the right given to an author if he registers his drawing, painting, or photograph at Stationers' Hall.

Music.—Copyright in music is governed by the Acts governing drama, and also by the Musical Copyright Act, 1888, and the Musical Summary Proceedings Copyright Act, 1902, passed to stop pirating of music.

Books, pictures, and other things copyrighted must be original, innocent, of literary or artistic value, and not intended to deceive the public.

Remedies.—The remedies are similar to those in case of infringement of patent rights, but the omission to register the copyright is not fatal unless it is not registered before the commencement of the action.

Designs.—Designs may be copyright for five years, under the Patents, Designs, and Trade-marks Acts, the design being registered in the Register of Designs at the Patents Office.

TRADE-MARKS

Object.—Trade-marks are intended to ensure to a person that the goods he buys are the goods of the registered owner of the special mark, word, brand, ticket, heading, label device, signature or name, written, printed, stamped or impressed on, or woven in, or attached to the goods. The chief statutory enactment on this question is the Patents, Designs, and Trade-marks Act of 1888.

This Act gives the above as being legal as trade-marks, but if a distinctive word is used, it must be an invented one, e.g. "Camwal," the initial letters of the official name of the "Chemists Aerated Mineral Water Association, Limited;" but not a collection of misspelled words, e.g. "Uwanta" meaning "You want a," or "Orlwool" meaning "All wool." Further, the word must have no reference to the character of the goods, and must not be descriptive nor a geographical name. "Perfection" applied to goods would not be registered.

Trade names.—Trade names are not like trademarks; they are allowed to be the exclusive property of persons by long use, and they may have descriptive or geographical words among them, e.g. "Yorkshire Relish." The restraining of persons from using trade names of others, depends not on statute, but on the equitable principle that a person shall not pass off his own goods as those of another. In *Reddaway v. Banham*, B. was restrained from putting his goods on the market under the name of *camel hair* belting (although his belting consisted in part of camel hair), there being belting on the market known to the trade by that name and belonging to R., the plaintiff. Every man may trade in his own name, and his right is not lost because that name is similar to that of another and better-known firm; but he must not so use the name that he may be said to dishonestly mislead the public by the use; e.g. a new beginner of the name of Berrie could not advertise himself as dyer under the name of, say, the "original Berrie," dyer.

Assignment.—Trade-marks and trade names are assignable, and are generally sold along with, or as

part of, the goodwill of a business concerned with the class of goods to which the trade-mark or name applies.

QUESTIONS

183. What is meant by patent rights, and for what period are they granted?
184. How are patents obtained?
185. What remedy has a patentee for infringement?
186. State the law in regard to the copyright of books and of lectures.
187. For what period are designs protected?
188. What is included in the term trade-mark?
189. To what extent are trade names protected?

PART IV

CHAPTER XVII

PROCEEDINGS IN BANKRUPTCY

Who may Petition—Conditions—Acts of Bankruptcy—Who can be made Bankrupt—Procedure after Order—Trustees—Proof of Debts—Committee of Inspection—Claims of Creditors—Property Available—Reputed Ownership—Discharge of Bankrupt—Private Arrangements.

WHEN a person is insolvent, he may be proceeded against in bankruptcy by the presentation of a petition to a competent court asking for an order of adjudication.

Court.—The competent court having jurisdiction in bankruptcy is: (1) the Bankruptcy Division of the High Court of Justice in cases where the debtor has resided in London for a greater part of the six months next preceding the petition, or where he is abroad, or his place of business or residence cannot be located by the petitioner; and (2) in all other cases the county court in the area of which the debtor has resided or carried on business during a greater part of the six months immediately before the presentation of the petition.

Who may petition.—A debtor unable to pay his debts may file his own petition, or any creditor or group of creditors to whom the following conditions apply are within their rights in petitioning :—

Conditions.—1. The debt or aggregate of debts of the petitioner or joint petitioners must amount to £50, and be a liquidated sum payable at a certain time.

2. The debtor must have resided in England or carried on business in England during the year preceding the petition. No foreigner, if simply represented by an English agent, is liable to English bankruptcy law, the agent by custom being liable for contracts made on his principal's behalf (*see "Agency"*).

3. An act of bankruptcy must have been committed within three months of presenting the petition. No act of bankruptcy may be taken advantage of for purposes of petitioning after three months have elapsed.

Acts of bankruptcy.—There are three classes of acts of bankruptcy—

1. Personal acts of the debtor.

2. Dealings with the property of the debtor which give rise to suspicion of fraud or unlawful transgression of the laws of bankruptcy.

3. General acts indicating insolvency.

Personal acts.—Personal acts of bankruptcy among others include—

(a) Denial of audience to creditors and general avoidance of creditors, or what is called “keeping house.”

(b) Departing from home or England to avoid creditors.

Dealings with property.—Certain dealings with property as being contrary to the policy of the bankruptcy

laws are also acts on which a petition may be presented within the stipulated time. *E.g.*—

(a) Conveyance or assignment of property for the benefit of all creditors.

(b) Fraudulent conveyance or gift of property to a wife or child to avoid creditors or to delay them.

Acts of insolvency.—A debtor shows his insolvency and so commits an act of bankruptcy when his goods are seized under a judgment, and the goods are sold by the sheriff, or held in his possession for twenty-one days; also when the debtor gives notice that he has suspended or intends to suspend payment. Of course, filing his own petition is an act of bankruptcy, and failure to comply with the terms of a bankruptcy notice is also an available act of bankruptcy.

Bankruptcy notice.—Bankruptcy notices are issued by creditors after obtaining final judgment against a debtor, demanding payment, security, or composition. If the debtor fails to satisfy his creditors within seven days, the latter can petition on this failure, as an act of bankruptcy.

Who can be made bankrupt.—1. Infants in respect of necessaries may *perhaps* be made bankrupt, but not otherwise.

2. A married woman, except as trading separately from her husband, cannot be proceeded against in bankruptcy; but she may if trading apart from her husband, become liable to bankruptcy jurisdiction to the extent of free separate property (*see "Capacity to Contract"*).

A married woman, under no circumstances being personally liable, cannot be made bankrupt by petition on a bankruptcy notice.

3. Corporations, friendly societies, limited companies, partnership firms *as such* cannot be petitioned against. Of course in this latter case bankruptcy proceedings are instituted against individual members of the firm.

With a few minor exceptions (*e.g.* foreign sovereigns and their representatives) all other parties fall under the bankruptcy jurisdiction.

Receiving order.—When the petition has been duly filed by a creditor, the court hears the case, and on proof of the act of bankruptcy, amount of debt, regular service of the petition, and minor details, a receiving order is made. In case the debtor himself petitions, the order is made at once, and he may at his own request be forthwith adjudged bankrupt.

Up to the time of the making of the receiving order the debtor is not yet a bankrupt nor is his property taken from him, but the order curtails his powers of disposal. By virtue of the order the official receiver becomes the receiver and manager of the debtor's property, and creditors cannot proceed against the debtor (except with leave) other than by means of the bankruptcy laws. This, of course, is qualified in case of secured creditors, who may realize their securities notwithstanding the order.

No order will be made if all the debtor's property would be divested on such an event; *e.g.* money is often settled on X. for life, or until bankruptcy, and on death or bankruptcy over to Y. If such settled funds were the sole asset of X., the court would probably refuse to make an order, as it also would in any case if no benefit would accrue to the creditors.

Procedure after order.—Before the conclusion of the

public examination of the debtor, a meeting of creditors is called by the receiver. The debtor may wish to offer a composition, and he must submit his scheme to the official receiver before this meeting. The meeting may then approve, but the approval is not binding unless accepted by a majority in numbers and three-fourths in value of the creditors. The approval requires confirmation by the court, which may refuse or approve as it thinks best for the general body of creditors. If the scheme is accepted the debtor never becomes a bankrupt. But a scheme is never accepted if it does not show 10s. in the £1, or if the debtor has failed to keep proper accounts, or has committed fraud among other things. These last defaults will authorize the court to refuse to discharge an adjudicated bankrupt.

Refusal to accept the composition.—If the creditors refuse the composition, or no scheme is offered for their approval, the court is bound to proceed to adjudication, and the debtor becomes an adjudicated bankrupt, his property is taken from his control, and is vested entirely in the official receiver or the trustee in bankruptcy appointed by the creditors.

Trustees in bankruptcy.—Trustees are appointed by the creditors, or in default, by the Board of Trade, the official receiver always acting as interim trustee. Such trustee is remunerated by a percentage on the assets realized, and a further percentage on the amounts paid over to the creditors as dividends. Such mode of payment conduces to diligence on the part of the trustee.

The bankrupt's property vests in the trustee, who carries out incomplete contracts and deals generally on behalf of the estate under the style of "the trustee of

X., a bankrupt." As a general rule, the bankrupt's personal earnings do not vest in the trustee. The trustee may in this capacity sell the property, give discharges and receipts, and with consent of the Board of Trade or committee of inspection (*q.v.*) he may carry on the debtor's business for winding-up purposes, mortgage or pledge property to raise money, divide property specifically if that is advantageous, repudiate onerous or disadvantageous contracts, and allow the bankrupt to carry on business as manager at a salary.

Accounts.—The trustee is requested to keep accounts in the form prescribed by the Board of Trade, a special book, "The Estate Cash Book," being provided for this purpose.

At the expiry of six months from the date of the receiving order, and every six months thereafter (or when the estate has been fully realized and distributed, if that happens sooner), the audit of the accounts becomes due. If there is a committee of inspection, the accounts should be audited by them before being forwarded to the Board of Trade immediately upon their becoming due.

The trustee is also requested to furnish at each audit a report on the position of the estate.

If a business is carried on, a separate trading account must be kept, and the weekly totals of receipts and payments respectively should only be entered in the Estate Cash Book. The trading account should be audited at least once every month by the committee of inspection.

Guarantee.—A trustee is required to furnish security, and the cost of the premium on the bond will not be

allowed against the estate unless the creditors or the committee of inspection have specially approved such charge.

Who can prove.—Creditors for all debts and liabilities, present, future, certain, or contingent, may prove, and their debts are said to be provable in bankruptcy. The creditor must make an affidavit that the debt is due, and give particulars to the official receiver, who hands over such proofs to the trustee. The trustee examines and accepts or rejects the claim within twenty-eight days.

Debts and liabilities contracted after notice of an available act of bankruptcy are peculiarly placed—they are provable in bankruptcy, but proof is not accepted, and hence, although no dividend is paid on debts not proved, they are discharged by discharge of the bankrupt. Other debts not provable are, however, not discharged, *e.g.* money due on an affiliation order or as alimony under an order of Justices, or a decree of the Divorce Division.

Committee of inspection.—The creditors may appoint not less than three nor more than five of their number to superintend the proceedings and to give instructions to and supervise the work of the trustee. Such persons are called a “committee of inspection.” They audit the books and give permissions as above stated for extraordinary proceedings by the trustee.

Employment of solicitor.—If the trustee requires the services of a solicitor, he must obtain the prior sanction of the committee of inspection, and should see that the resolutions authorizing the employment of such solicitor specify the precise nature of the work to be performed.

A general authority to employ a solicitor is not sufficient.

Allowance to debtor.—Any allowance made to the debtor must be voted by the committee of inspection, and must be a money allowance unless otherwise specially determined by the creditors.

The committee of inspection are required by the Act of 1883 to meet at such times as they shall appoint, and, failing such appointment, at least once a month. Therefore, in the absence of specific instructions to the contrary, the trustee should summon meetings once a month.

Claims of creditors.—Proof is not always the only way to claim on a bankrupt's estate, nor is the estate always liable for a genuine debt until 20s. in the £1 has been paid to other creditors; *e.g.*—

1. A landlord may distrain for not more than six months' rent due before the adjudication, and prove for any balance.

2. Mutual debtor and creditor may have the general balance of account stated, and proof given or payment of the debt to the bankrupt's estate be made, as the case may be.

3. A married woman may not prove in her husband's bankruptcy for money lent to him for his trade or business until all other claims are met in full.

4. The claim of a vendor of goodwill or a lender of money to a partnership firm on an agreement to share in the profits, is not provable until all claims are paid in full (*see "Partnership"*).

5. Secured creditors have several courses open, any of which they may follow. (a) They may realize their

security and prove in the ordinary way for the balance of the debt. (b) They may surrender the security and prove for the whole debt. (c) They may assess the value of the security *bona fide* and prove for the balance. The trustee may in this latter case redeem the security at the creditor's assessment.

6. Rates and taxes to the extent of one year's assessment, wages or salary of a clerk for four months' service to the extent of £50, and wages of an unskilled workman for two months to the extent of £25, are all recoverable before dividends are paid. Such sums are to be paid in full under the Preferential Payments Act, 1888.

Property of a bankrupt available.—Every debtor must assist to discover property belonging to his estate, and failure in this respect may bring upon the debtor a charge of contempt of court. The property of the debtor is vested in the trustee for division, and consists of all the property of the debtor, whether in his possession or coming into his possession after adjudication, either in England or abroad, including money, goods, choses-in-action and land, but not his personal earnings.

Exemption.—Of the above, certain exemptions are made, namely, tools of the debtor's trade, necessary wearing apparel and bedding for himself, his wife and children, to the value of £20 at the utmost, will not pass to the trustee, nor will goods held by the debtor as trustee for another. The trustee is not bound to take over lands burdened with covenants, partly paid stocks, or unprofitable investments. Instead, he may disclaim, and the parties injured by the disclaimer can prove as creditors to the extent of their injury. The trustee

must exercise his right to disclaim within three months of appointment or two months of his discovery of the onerous property.

Other property divisible—Reputed ownership.—Goods of other persons in the possession of the bankrupt, and at his order or disposition, are in some cases liable. This liability attaches in cases where the goods are in the bankrupt's hands in his trade or business with the consent of the true owner, so that the bankrupt is the reputed owner of the goods, and so could, if he wished, obtain credit on the strength of his possession. This state of things is founded on the doctrine of reputed ownership, found in the "order and disposition clause," sect. 44, of the Bankruptcy Act, 1844.

The doctrine known as the "doctrine of relation back" also plays its part, and places property, which the bankrupt has assigned during the period between the act of bankruptcy on which the petition is presented and the adjudication, at the disposal of the trustee. The doctrine is so named because, while the trustee's title does not actually come into force until adjudication, it relates back to the time of the earliest available act of bankruptcy which could have been taken advantage of, i.e. any act occurring within three months of the presentation of the petition. The doctrine, however, will not affect *bona fide* payments by the bankrupt or other *bona fide* dealings, provided such dealings take place before the receiving order, and the other party has no notice of an available act of bankruptcy.

Under sections 47 and 48, any conveyance of property fraudulently or without consideration is void. If the bankruptcy occurs within two years of a settlement,

not made in consideration of marriage or for value, it is *ipso facto* void, and the property so settled vests in the trustee; and if the settlor becomes bankrupt at any time within ten years, the persons claiming under the settlement are bound to prove that the settlor could pay his debts without the aid of the settled property, and that the property passed out of the settlor's hand into the hands of the trustees when the settlement was executed.

Dividends.—It is necessary that such steps be taken as will enable a trustee promptly to declare dividends within the periods prescribed by the Bankruptcy Act.

All proofs should be dealt with within twenty-eight days of their receipt, and on the first day of each month the trustee should file with the registrar a certified list of the proofs received, and forward therewith all proofs, whether admitted or rejected. After the time limited by the notice of intention to declare a dividend has expired, all proofs must be dealt with within seven days.

Before a dividend is declared the trustee must give notice of his intention to do so to all such creditors mentioned in the bankrupt's statement of affairs as have not proved their debts. A notice must also be inserted in the *Gazette*.

The dividend should be declared within two months of the date of the notice, and if for any cause it is delayed, a fresh notice must be gazetted. When the dividend is declared, notice thereof must be given to all creditors who have proved, and must be accompanied by a statement showing the amounts realized and the expenses incurred.

The payment of dividends is (except where a local bank has been authorized) made by cheques on the Bank of England, or money orders, which are prepared by the Board of Trade on the application of the trustee.

Discharge.—A bankrupt may apply to be discharged at any time after his public examination, and the court after considering his case may decide in various ways : (1) they may refuse the order for discharge ; (2) grant an absolute discharge ; (3) grant a conditional discharge.

The court is bound to refuse to grant an order of discharge when a criminal offence has been committed by the bankrupt, and it must either refuse or grant a conditional or suspended discharge until 10s. in the £1 are paid in the following cases :—

1. When the assets are less than 10s. in the £1, unless owing to misfortune or circumstances outside the power of the debtor.
2. When the bankrupt omitted to keep proper books of account during the three years immediately preceding the bankruptcy.
3. Where the bankrupt continues to trade after knowledge of insolvency.
4. Where debts have been contracted without any expectation of being able to pay.
5. Failure to account for loss or deficiency.
6. Where the bankrupt has been rash in speculation and extravagant in living.
7. Where liabilities have been incurred in order to make the assets 10s. in the £1.
8. Where undue preference has been given to creditors within three months of the receiving order.

9. Where the bankrupt has been through the bankruptcy court previously, or where he has compounded or arranged with creditors.

10. Where he has been guilty of fraud or fraudulent breach of trust.

Disqualification.—If no order of discharge be made, the bankrupt is disqualified during his life, or in case of misconduct, even after discharge, for five years at the outside, from sitting or voting in the House of Lords if a peer, from being elected to the House of Commons if a commoner, from sitting or voting if a member, from being put on the commission of peace, from acting as a justice if already on the justice roll, and from holding or acting in the office of mayor, alderman, councillor, guardian or similar office on a local government body.

No undischarged bankrupt may obtain credit to the amount of £20 or upwards from any person without giving that person notice of his status, under the liability to suffer one year's imprisonment as a misdemeanant.

Effect of the order of discharge.—The debtor is released from liability for debts provable in bankruptcy by the order of discharge, except debts on recognizance, debts arising out of affiliation orders and orders for alimony, debts arising out of fraudulent breach of trust, and liability to pay money penalties for breach of the bankruptcy laws or for criminal offences.

Annulment.—A bankruptcy may be annulled by the court if in its opinion the order of adjudication ought not to have been made, or if the debtor pays all his debts in full, or if a scheme of arrangement is accepted by the creditors and approved by the court, and carried

out after adjudication. Annulment, however, will not make illegal any act of the official receiver or trustee, done by him in his official capacity, but such act will be perfectly valid even though as matters turn out it is unnecessary.

Private arrangements.—Among acts of bankruptcy will be found "assignments of property for the general benefit of all creditors." Such assignments are private arrangements and not compositions as provided by the bankruptcy law.

In these cases the property is assigned by deed to a trustee to realize and divide the proceeds between the creditors rateably, and to hold any surplus in trust for the debtor. Such deeds usually contain a discharge to the debtor from his debts. Assignments of this class are binding only on consenting parties. Any creditor not assenting and being dissatisfied may, instead of executing or assenting to the deed, present a petition on such arrangement as an act of bankruptcy. If the petition be presented within three months from the date of the deed, and adjudication follow, the assignment is void, because of the relation back of the trustee's title.

Such assignments must be registered under the Deeds of Arrangements Act, 1887, in the Bills of Sale department of the central office of the Supreme Court within seven days of execution. A copy of the deed is filed with the registrar of the county court having jurisdiction. Persons are allowed to peruse and make extracts from such copy during the office hours of the registrar.

QUESTIONS

190. Under what conditions may a petition in bankruptcy be presented?
191. Enumerate what are considered to be acts of bankruptcy, and acts of insolvency.
192. Mention who can, and who cannot be made bankrupt.
193. What is the effect of a receiving order?
194. Describe the procedure after the making of the receiving order.
195. State the powers of a trustee in bankruptcy.
196. State the debts provable in bankruptcy.
197. What is meant by a committee of inspection?
198. What is the position of a landlord in regard to a claim in bankruptcy?
199. State the creditors whose claims are postponed until other claims are paid in full.
200. State the course available to secured creditors.
201. Give a list of preferential payments in bankruptcy.
202. State the property of the bankrupt that does not pass to the trustee.
203. Discuss the question of reputed ownership.
204. Under what circumstances must a bankrupt's discharge be refused or suspended?
205. State the liability of an undischarged bankrupt in obtaining credit to the amount of £20 and upwards.
206. Explain the meaning of a private arrangement, and an assignment of the debtor's property.

CHAPTER XVIII

CONFLICT OF LAWS

As to Property—Domicile—Contracts—Bills of Exchange and Shipping Documents.

IN questions of commercial law the rights and liabilities of foreign merchants often arise. It is well known that contracts may be perfectly legal in one country and illegal in another. Certain formalities are required to be observed in certain cases in English law, and these formalities are often not required, say, according to French law, other requirements taking their place. Take, for example, the Bills of Exchange Act, 1882. We know that the law as to English bills, or bills negotiated in England, is governed by this Act, but the Act will have no effect on questions of negotiation abroad. The French law will have, as a rule, nothing to say about the contravention of the English stamp laws.

Cases may occur in which contracts are arranged in our country, the performance of which is to take place abroad. What court in such case has jurisdiction, and what law must be applied in case of breach? The latter question is soonest answered by begging the former, given the competent court, then that court will apply the law of its own country; but by comity of

nations, and for public convenience in the advancement of commercial relations, such courts may to some extent apply and enforce the law of another country, not, however, thereby making it the law of the land in which the court has jurisdiction. In this behalf our English courts are willing to enforce to some extent the laws of foreign states, including in this connection the laws of Scotland, the colonies, and Ireland to a smaller degree.

Law applied to property.—Not every country classifies the property in it under the heads real and personal, but the bulk of those countries where the law has anything of a scientific basis divide their property into movable and immovable. This latter class (immovable property) is governed by the law of the place in which the property is situated. Movable property, on the principle *mobilia sequuntur personam* (movables follow the person), is governed by the law of domicile of the owner. Thus, if the owner is subject to the law of a certain country, then his movable property, wherever situated, will be so subject; e.g. X. dies in England having a balance in a Parisian bank, then if X. be a British subject or domiciled in England the money devolves according to English law, and not according to French law. On the other hand, if X. had land in France, the land would be governed by French law.

Domicile.—A person is said to be domiciled in a country when he resides there, with a present intention of making it his permanent home, and without any intention of returning to his own or any other country in which he may have been domiciled. Mr. Hall, in his "International Law," says, "If a person goes to a country with

the intention of setting up in business, he acquires a domicile as soon as he establishes himself, since the conduct of a fixed business necessarily implies an intention to stay permanently ; if, on the other hand, he goes for purposes of a transitory nature, he does not necessarily acquire a domicile, even though he remains a time in the country after completing his business." Thus, two elements are essential to establish domicile : (1) residence in a country ; (2) intention to continue that residence without any intention of ultimately leaving it. Hence, a man may change his domicile from time to time, and as often as he likes.

Contracts.—A contract between two parties is valid, as a rule, if it is valid in the country where the agreement is made, and in general it will be enforced against a party liable on it by a court having jurisdiction elsewhere. If a contract is made without regard to the law of the place where it is made, the contract is as a rule unenforceable elsewhere, unless the parties agree to contract according to the law of another country to which one party is subject ; e.g. if an Englishman makes a contract with a Frenchman in France, *prima facie* the contract would be governed by French law, but they may expressly agree to contract, and that the contract shall be determined by the formalities required by English law. If, however, the contract is to be governed by foreign law, and a suit is brought in the English courts, the laws of evidence required in English law will not be suspended, and if not complied with the suit will fail ; e.g. sect. 4 of the Sale of Goods Act must be complied with, and also sect. 4, Statute of Frauds.

In general, the law which is to be applied to contracts is that of the place where the contract is made, or of the place where performance is to take place; unless the contrary intention appears, either expressly or from surrounding circumstances.

Bills of exchange and shipping documents require a further examination.

Bills.—Bills are good in England:—

1. If according to the law of the place of issue, excepting revenue laws (absence of stampage).
2. The various contracts on the bill must be according to the law of the country in which they are made, e.g. indorsing and accepting.
3. Days of grace where reckoned are according to the law of the country where the bill is to be paid.
4. Acts of protesting and notice of dishonour are to be according to the law of the place of dishonour.

Charter parties and similar documents are governed by the law of the country to which the vessel concerned belongs.

An alien may bring an action against an Englishman on a broken contract in an English court if the contract be broken in England, except in time of war, when such alien has no *locus standi* in the English courts. A judgment of a foreign court (including Irish and Scotch courts) against a man having goods in England cannot be directly enforced until it is sued on and a judgment obtained in the English courts. In such a case execution of the judgment will be enforced by the English courts.

QUESTIONS

207. State the difference of classification in the law of property in England and France.
208. What is the general rule in regard to contracts in English and foreign courts?
209. State how the law affecting bills of exchange and shipping documents is usually interpreted in England and abroad.

CHAPTER XIX

STAMP DUTIES

Stamp Act, 1891—Cancellation—Definition of Bill—Note—Miscellaneous Duties.

Under the Stamp Act, 1891.—The Stamp Act, 1891 (54 & 55 Vict. c. 39), enacts that for the future this Act shall govern the stamping of instruments and documents required by law to be chargeable with stamp duty; and unless specifically exempted, the stamp must be an impressed one.

Bills, etc.—Cancellation.—In the case of bills, notes, etc., the exceptions are: (1) where the duty payable is one penny, that duty may be denoted by a penny adhesive stamp, properly cancelled by the party signing the bill before delivering it; (2) where a bill or note be drawn in a foreign country, and comes into the hands of a person in the United Kingdom, he shall, before dealing with it, affix and cancel adhesive stamps of the proper amount. If in the latter case the stamp is already affixed but not cancelled, the holder may cancel, and such cancellation is valid. A bill requiring an adhesive stamp is not properly stamped unless the stamp be cancelled. This is done by writing the name or initials of the person cancelling, with the date of cancelling, upon the stamp, or by any other method

which will effectively render the stamp useless for any other instrument or purpose.

The penalty for neglecting to cancel a stamp is £10.

Bill defined.—The Stamp Act defines for its own purpose several instruments which are elsewhere differently defined. Bills of exchange within the Stamp Act include any draft, order, cheque, letter of credit, and any document except a bank-note, entitling a person, whether named or not, to payment by any other person of any sum of money, or entitling a person to draw on another (compare Bills of Exchange Act, 1882).

Note defined.—A promissory note includes any document in writing (except a bank-note) containing a promise to pay any sum of money, even though the sum is expressed to be paid out of a particular fund, or upon a contingency or condition (see definition in the Bills of Exchange Act, 1882).

Bank-note—Penalties.—A bank-note includes any bill or note issued by a banker (other than the Bank of England) for payment of a less sum than £100 payable to bearer on demand. Such note issued duly stamped, or unstamped if the issuing banker is authorized to issue unstamped notes, may be reissued without any further duty being paid. If an unauthorized person issues or deals with an unstamped note, he is liable to a fine of £50 if he issues, or £20 if he receives with knowledge of the defect. Persons issuing or dealing with other unstamped documents, being promises or orders to pay, are liable to a penalty of £10, and persons indorsing or negotiating, or presenting for payment or security, incur a similar penalty. If,

however, a bill of exchange on demand is presented unstamped, the person to whom it is presented for payment may affix and cancel a penny adhesive stamp, deducting the value of the stamp from the cash paid. Such action on part of the person paying will not relieve any party from liability for dealing with an unstamped bill.

Bills in a set.—In case of bills in a set, only one part requires stamping, unless the other parts be issued or negotiated apart from the stamped part. Unstamped parts of a set are not subject to the rule that unstamped instruments cannot be admitted as evidence; e.g. if the stamped part be lost or destroyed, any other part not issued may be produced as evidence of the contents of the bill.

MISCELLANEOUS DUTIES.

	s. d.
Bills of exchange payable on demand, or within three days after date or sight, for any amount	0 1
Any other bill of exchange not exceeding £5, and all notes not exceeding £5	0 1
Exceeding £5, but not exceeding £10	0 2
" £10 " " £25	0 3
" £25 " " £50	0 6
" £50 " " £75	0 9
" £75 " " £100	1 0
Every hundred and fraction of £100	1 0
Foreign bills drawn and payable outside the United Kingdom exceeding £50 but not exceeding £100, and each £100 and fraction of £100	0 6
Other duties as in Inland bills.	

Bank-notes not Bank of England.

Up to the value of £1 . . . 5d.	Up to the value of £20 . . 2 0
" " £2 . . . 10d.	" " £30 . . 3 0
" " £5 . . 1s. 3d.	" " £50 . . 5 0
" " £10 . . 1s. 9d.	" " £100 . . 8 6

Protest of a Bill or Note.

Where the duty is under 1s. the stamp for protest is equal to the duty on the bill, and all other cases require 1s. stamp.

Patents.

	£ s. d.
Provisional protection	1 0 0
Filing specification	3 0 0
Proxy to vote at a meeting	0 0 1
Bill of lading	0 0 6
Charter party	0 0 6

Bond.

Not exceeding £10, 3d.; not exceeding £25, 8d.; not exceeding £50, 1s. 3d., and 1s. 3d. for every fifty or fraction thereof up to £300. Exceeding £300, 2s. 6d. per £100 or fraction of £100. Stamp duty on a fidelity bond never exceeds 10s.

INSURANCE POLICIES.*Life.*

Sum assured.	Duty.
£10 or under	1d.
Over £10, but under £25, or £25 exactly . . .	3d.
„ £25 „ £500, or exactly £500 . . .	6d. for £50 or a fraction of £50.
„ £500 „ £1000 „ £1000 . . .	1s. per £100 or a fraction of £100.
„ £1000	10s. per £1000 or a fraction of £1000.

Marine.

Premium not exceeding 2s. 6d. per cent.	1d.
Other cases for £100 or fraction of £100	3d. (Voyage).

Time Policy.

For £100 or a fraction of £100 for 6 months	3d.
With a continuation clause (see "Insurance") an extra duty of	6d.

CHAPTER XX

LANDLORD AND TENANT

Agreement—Classes of Freehold—Sub-letting—Capacity to Let—Leases—Terms of Tenancy—Rights of Parties—Repairs—Recovery of Rent—Fixtures—End of Tenancy.

Introduction.—The subject of landlord and tenant is not generally included in a text-book on commercial law, but it is very necessary that a business man renting premises should know what are his rights and liabilities as between himself and his landlord. The difficulty which meets one in this subject is not what to say, but what to omit, for the relationship of landlord and tenant is a very wide subject, embracing many varied issues.

Writing—Deed.—Although in some cases it is unnecessary to have a written agreement between a landlord and tenant, yet by Statute it is absolutely essential that a written agreement shall exist in many cases. Thus in all cases where property is leased for a longer term than three years the lease must be by deed, and would be informal if only by agreement. At this point it is well to observe that, where the agreement is written, it should, for the sake of safety, be drawn by a solicitor, who will be able to protect his client and safeguard his interests. Much needless litigation has its birth in the

desire of parties to avoid seeking legal advice ; but it is better to call in such advice in the beginning at a nominal cost than to get deeply in the mire later, and to be extricated at a large cost. The wording of covenants to repair, insure, etc., is always more clearly expressed when drawn by a competent hand. We must also note that an "agreement for a lease" must be in writing, in order that it may be enforceable (*Statute of Frauds*).

Before we consider the lease, however, we must examine as to who has powers of leasing, to whom he may lease with safety, and what he may lease. The distinction of personal and real property has been noted elsewhere, and here we may say that the owner of real property is as a rule a freeholder.

Freehold.—"Freehold" is not easily defined, and much space would be required to indicate the origin of the term. It is sufficient to say that while a person having the freehold is in theory of the law a tenant of the King, to whom all the land theoretically belongs, he is practically an absolute owner. Being absolute owner, the freeholder may let out to another his land for any period or "term," on which the freeholder and the other party agree. He may let it out for a week, a year, or any number of years, and so create the relationship of landlord and tenant, or, in case the agreement is a lease, the relationship of lessor and lessee.

While a person is the apparent possessor of land, he may not be absolute owner to deal with it as he chooses, although he is a freeholder. He may have any of the following "estates":—

1. *Fee-simple*.—The fee-simple gives absolute power to the holder to sell and to dispose of the proceeds of the sale at his own discretion, and to leave the land by will to whomsoever he chooses if he has not in life disposed of it.

2. *Fee-tail*.—Estate in fee-tail (tail = cut) or freehold estate, which by settlement or arrangement descends to his children in a certain way on the death of its owner, and which without certain formalities cannot be disposed of during his life, *i.e.* he has during his lifetime the right to possession and enjoyment, which right he may not part with without disentailing.

3. *Estate for life*.—Estate for life, or the right of enjoyment during his own life, or during the life of some other person, as the case may be.

If a party is a freeholder with a limited estate, as in 2 and 3, his powers of leasing for long periods are limited, for if he leased for, say, 999 years, his act would affect the rights of his successor. He is therefore limited by law (Settled Land Act, 1882) to the following :—

Powers of leasing of tenant for life.—He may make a building lease for 99 years, a mining lease for 60 years, and an agricultural lease or other lease for 21 years, but in no case for a longer period. Letting of land and premises generally is always subject to conditions, which if broken may involve forfeiture ; hence a leaseholder may by breach of conditions or covenants in his lease lose his rights over the land let or leased to him.

Lease by leaseholder, *i.e.* *sub-letting*.—Unless restricted a leaseholder may sub-let for any period short of his own term, or the residue of his term, but a business

man, or man in trade, in taking a lease from a leaseholder will do well to see that the party letting has not been restricted in his lease (the head-lease as it is called) as to sub-letting, and that the proposed trade or business to be carried on is not forbidden by the head-lease. The immediate tenant of the freeholder should in sub-letting see that the same covenants and conditions are included in the sub-lease as are found in the head-lease, as a breach of a covenant contained in the head-lease by the sub-tenant operates as a forfeiture of the head-lease: *E.g.* X. the freeholder lets for 99 years to Y.; Y. sub-lets to Z. for 21 years. In the lease under which Y. holds, X. forbids that the premises be used as a school, but no mention of this is made in Z.'s lease. Z. opens a school on the premises, thus causing a forfeiture of the head-lease, and Y.'s term comes to an end.

Capacity.—Letting by a freeholder, or sub-letting by a leaseholder, is subject to the general law of contract as to capacity; *e.g.* letting to an infant is not safe, as the lease cannot be enforced, although rent due may be recovered for use and occupation. Lunacy and drunkenness have the same effect in leasing as in any contract.

An infant cannot grant a lease which is enforceable, but, if it should be for his benefit, the court may order leases to be made, and the trustees may make such leases on behalf of the infant as if he were a tenant of the freehold for life. Alien enemies are also incapacitated.

What may be let or leased.—It must not be concluded that the only premises which can be let are houses, land, warehouses, and mills. Any right of property may be

let, except pensions from the Crown, public offices, dignities, and titles. Fishing rights, mines and minerals, rights of pasture may be let, apart from the land itself. Rights to cut wood, turf, and the like are made the subject of leases, but such leases are not within our province.

A lease or tenancy is seldom taken for less than one year, but for whatever term, the conditions of the letting, and powers and duties of the lessor and lessee, should be set forth in writing.

Leases.—Leases are written contracts often under seal entered into by a party who for our purposes may be called the owner, or lessor, and another party called the lessee; the owner or lessor agrees to let, the lessee agrees to take certain specified land and buildings, and to pay a certain sum called a rent, subject to certain duties and conditions mutually settled, and various covenants consequent on the taking of land.

Yearly tenancies.—Leases of business premises may be simply yearly tenancies, or agreements to let and take from year to year, determinable at the end of the first or any future year by either party giving the other six months' or, in agricultural and market garden lands, a year's notice to quit. An agreement for "one year certain" ends with that year without notice, and "one year certain and so on from year to year" is at least a tenancy for two years.

No express or written agreement is necessary to create a yearly tenancy. Entry creates a "tenancy at will," which may be terminated at any moment, but upon the payment and acceptance of rent at the agreed rate a yearly tenancy is created, and the terms may be

proved orally. If the rent is a weekly one, the tenancy is a weekly tenancy, but an *annual* rent paid monthly, quarterly, or weekly points to a yearly tenancy, and cannot be determined except by a half-year's notice, terminating on the anniversary of the date of entry, or a customary half-year's notice, terminating on an agreed quarter-day, or the quarter-day on which tenancy commenced. Weekly tenancy may be determined by a week's notice. Quarterly tenancy may be determined by any quarter's notice. Monthly tenancy may be determined by a month's notice.

In signing an agreement for a yearly tenancy, care should be taken that the terms are thoroughly understood, and that they express the intention of both landlord and tenant.

Longer terms.—Terms of five, seven, fourteen, or twenty-one years are commonly found in leases of shops, warehouses, and mills. Such leases are usually in duplicate: one part signed and sealed by the lessor is in the lessee's hands, and is called the original; the other signed and sealed by the lessee is in the landlord's hands, and is called the counterpart.

The lease, in absence of agreement, is prepared by the lessor's solicitor at the cost of the lessee; the lessor as a rule retains the counterpart.

If the lease is preceded by an agreement, all covenants intended to be included in the lease should be: otherwise only "usual covenants" can be insisted on. These are covenants to pay rent and taxes (except those payable by the landlord at law), to keep in repair, to give power of re-entry for non-payment of rent, and that the lessee shall have quiet possession.

Rights of parties.—Landlords, unless expressly covenanting to repair, are not liable for repairs, or even to rebuild in case the premises are destroyed. The landlord simply gives up possession to the tenant, and impliedly covenants, if proper words are used, that neither he nor any one claiming through him will disturb the tenant during the term. If the premises are destroyed by fire or tempest, the tenant must continue to pay rent, and the landlord is not bound to rebuild. The lessor must not do anything to cause any depreciation in the value of his tenant's holding, but he does not guarantee that the premises (unless a furnished house) are habitable, or that business premises are useful in certain trades unless he gives an express warranty to this effect. The tenant takes all the risk of any damage due to defective buildings. If a stranger on the premises by the lessee's invitation, e.g. a customer, is injured by the ruinous state of the premises, the tenant is liable, and not the lessor, unless the latter agreed to repair, and becomes aware of dilapidation during the term, or knew of the condition of the building at the time of letting.

Rent—Repair.—The tenant is bound to pay rent on the day it is due, but it cannot be distrained for until dawn on the day after it is due. Rent is not payable in advance unless stipulated for. A tenant may be bound by agreement to repair, but apart from this he is bound only to make good damage done by him, to leave the premises wind- and water-tight, and to deliver the premises up at the end of his tenancy in such condition as when he entered upon them. If he promises in a general condition to repair, he is not responsible for structural defects.

Recovery of rent.—A landlord can recover rent in one of two ways:—

1. By action (*a*) in the County Court in the usual way for recovery of debts, and (*b*) in the High Court as follows: an indorsed writ of summons is served on the tenant, who may enter an appearance, and ask for a statement of claim. The landlord then claims a sum of money as being due for use and occupation, or he claims on the express covenant to pay rent. The tenant submits his defence, and the matter is heard in court and judgment given. If no appearance is entered by the tenant, judgment is entered for the landlord for rent and costs.

2. By distress. Rents of all kinds can be recovered by seizing the goods (except those exempted by statute) which are found on the leased premises. Right to distrain is lost by the tenant tendering the actual amount of rent due, and if distress is carried out in spite of legal tender, the distrainor is a trespasser.

In case of the tenant's bankruptcy, the landlord may distrain for six months' rent due prior to the adjudication, and may prove, as an unsecured creditor, for any balance of the rent due to him, over and above the distressment.

Goods exempt from distress are as follows:—

1. Fixtures.
2. Things left with the tenant to be worked upon in his business, *e.g.* a watch to be repaired, goods in the hands of a carrier.
3. Milk, meat, and perishable goods, but not crops.
4. Tools in use. All tools of trade are conditionally privileged.

5. Clothes, bedding, implements of business to the value of £5.

6. Goods of a lodger, if he makes a declaration as to his goods, states whether he owes any and what rent for his lodging, and (if anything is due) pays the same to the landlord distraining or his agent. Landlord in this case means the landlord of the building, not the keeper of the house.

Distress must be made between sunrise and sunset, and the entry must be peaceable, and not with a "high hand."

Fixtures.—The word "fixture" in law is often applied to things which are in their nature entirely opposed to the generally accepted meaning of the word. Legally it means something attached to land, or to buildings on the land, so as to have become substantially a part of that to which it is attached. Originally, that everything built upon the land belonged to the land was strictly applied as shown by the legal maxim, *Omne quod solo inaedificatur solo cedit*, but this rigour has by custom and statute been modified, and we have now two classes of fixtures—tenant's fixtures and landlord's fixtures. Originally anything affixed by a tenant must, in accordance with the maxim, be left on the land because it attached to the freehold and became the property of the landlord; now, however, certain things erected by a tenant may be moved by that tenant, and are called tenant's fixtures.

Tenant's fixtures are all articles attached to a building for purposes of trade or business, for domestic convenience, or for ornament, provided they can be moved without damage to the structure. Buildings resting on

the ground by weight alone, or resting on brick foundations by weight alone, are tenant's fixtures, and may be moved before the end of the tenancy; but a barn or conservatory of wood fixed with mortar to a brick foundation is not a tenant's but a landlord's fixture, and cannot be moved.

A building put up for trade purposes, however, may be moved by the tenant if he can do it without permanent injury to the land; he may also take trade implements, even though removal causes damage: hence engines, machines, and erections to protect the same are tenant's fixtures.

The Agricultural Holdings Act, 1883, enacts that a tenant may move such things as above mentioned if his rent be paid, no damage is done, or any damage done is repaired, and the landlord has received a month's notice in writing of intention to move. The landlord, however, has by this act the option to purchase the fixture.

A tenant may not remove tenant's fixtures after the tenancy has expired, and on the entry of a landlord, owing to a tenant's bankruptcy, the tenant and his trustee are both incapable of removing tenant's fixtures. If a tenant remains lawfully in possession of the premises after the expiration of the term, e.g. with the landlord's sanction, he may remove fixtures which are tenant's fixtures, but giving up possession takes away this right.

As examples of tenant's fixtures, we may take cornices, blinds, cabinets, washing boilers, cupboards, gasfittings, bells, shelves, clothes rails, ornaments (not architectural) fastened with screws and the like.

Windows, doors, keys and locks are not tenant's but landlord's fixtures, even though affixed by the tenant.

End of tenancy.—Tenants holding for a definite period, expiring on a given day, e.g. under a lease or an agreement for a year, may leave without giving notice, although it is usual to give notice of intention to quit. A tenancy from year to year is determinable by a six months' notice, as already noted this notice may be given on either side. Notice should be served on the landlord or agent, and if sent by post it is always safest to register the letter.

QUESTIONS

210. Mention the various kinds of freehold.
211. Mention some points in regard to the sub-letting of property contained in a lease.
212. Mention various forms of tenancy, and the notice requisite to terminate same.
213. What is the position of the landlord in regard to repairs ?
214. State the tenant's responsibilities in regard to repairs.
215. Upon what goods of a tenant may a landlord distrain ?
216. State the tenant's position in regard to fixtures.
217. What are fixtures ?

CHAPTER XXI

EXECUTORSHIP AND THE ADMINISTRATION OF ESTATES

Appointment of Executor, of Administrator—Who can be Executor—Who may administer—Renunciation and Delegation—Death of Executor or Administrator—Removal from Office—The Will and Probate—Will without Executors—Limited Administration—Powers of Executor and Administrator—Legacies—Carrying on Business—Right of Retainer and Right of Preference.

Appointment of executor.—When a man makes his will, he generally appoints some individual or individuals in whom he puts trust, to execute and carry out all the intentions expressed in the will. Such persons are called executors, and no person is an executor unless he has been appointed by a document duly executed as a will according to the requirements of the law. It is not, however, necessary to use the word “executor;” all that is necessary is that there shall be an appointment of a person to carry out the general intention of the will.

Appointment of an administrator.—Where a party makes no will or, as it is said, dies intestate, or where, though he makes a will, no executor is appointed or the executor refuses to act or is dead, then the President of the Probate Division of the High Court of Justice will

appoint a person to take charge of the property of the deceased intestate, and to administer the same according to the will (if any), or according to law. The person appointed is called an administrator.

An executor is, therefore, the nominee of the testator, and in this he differs from an administrator, who is an officer appointed by the court.

Executor de son tort.—A warning should be uttered in regard to the danger of meddling with the goods or affairs of a deceased person, or interfering in such a manner as to give the impression that the person so acting is exercising the function of an executor. Such person intermeddling is termed an *executor de son tort*, i.e. an executor of his own wrong, and he is liable to be sued by the true executor or administrator, by a creditor or legatee, for the due payment of legacy and succession duties to the amount of assets which may have come into his hands. His liability can only be ended on his accounting to the legal personal representative. On the other hand, he has none of the many protections which the law throws over a duly appointed executor or administrator. In all cases, unless appointed to the office by the will or by the Court, no person should attempt to deal with the estate of a deceased person.

Who can be an executor.—Any person not of unsound mind can fill the post of executor, but it is never advisable to appoint an infant. If a company possessing the necessary powers is appointed to be an executor of a will, some official nominated by the company acts in the capacity of administrator.

Who may administer.—The husband or wife of the deceased, as the case may be, has the right to letters of

administration, but in the case of a wife the court may grant to the next-of-kin instead of to the wife, or the grant may be to both jointly. In the event of the deceased leaving no husband or wife, the next-of-kin are entitled to administer—that is, children. In this case sons are preferred to daughters, grandchildren, father, mother, brothers and sisters. Administration and executorship are very onerous offices, and often no next-of-kin is to be found willing to undertake the duties of administration. In such case a creditor of the intestate may apply for letters, on the ground that he cannot get in his debt.

Bond.—Administrators are required to give a bond ; with sureties or at the court's discretion it may be dispensed with. The penalty is, as a rule, double the value of the estate, and the condition of the bond is that the person appointed shall properly administer the estate.

Renunciation and delegation.—An executor may renounce the office, *i.e.* he may refuse to prove the will, provided he has done no act impliedly accepting the office. This is so even if he had, in the testator's life, promised to serve in the capacity of executor. If a man take upon himself the liabilities of the office, he is in the position of a trustee or an agent, and cannot delegate his authority, except in cases where the acts required are in their nature outside his scope, *e.g.* acting as valuer, auctioneer, and the like.

If one of several executors renounces his rights the others can transfer personal estate without his joining, but real estate by the Land Transfer Act, 1897, vests in all the executors, and those executors who prove

cannot, without the concurrence of co-executors who have not proved, transfer the legal estate in freeholds.

Death of executor or administrator.—If an executor dies the estate devolves on the surviving co-executors, and no other party may interfere; but if the deceased executor is the last surviving executor, then his duties and interest will fall upon his executor; e.g. if A. dies appointing B. his executor, and *after* having acted as executor B. dies appointing C. his executor, then C. becomes A.'s executor also, to complete the administration. But the executor of a deceased *administrator* is not an administrator for the original intestate, nor is an administrator of an executor, administrator for the original testator. In brief—

A. by will appoints B. his executor.

(1) B. acts, makes a will appointing C. his executor.
B. dies, C. is A.'s executor as well as B.'s.

(2) B. dies without acting, an administrator (not necessarily C.) is appointed.

(3) B. acts but dies intestate, an administrator *de bonis non* is appointed as in (2).

Removal from office.—Under the Judicial Trustees Act, 1896, executors and administrators may be removed at the discretion of the Chancery Division of the High Court, and new administrators appointed in their places to administer the estate under the direction of the court.

The will.—A valid will can be made by any person, but not an infant (unless he is a soldier on active service or a sailor at sea), a person of unsound mind, or a married woman not within the Married Women's Property Acts, 1870-1893.

A valid will is one which is in writing, signed at the foot or end by the testator (or an agent in his presence and at his direction), such signature to be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, who must attest and sign the attestation, not necessarily together, but in the testator's presence.

An attestation clause is not absolutely necessary, but it saves considerable trouble in probate, as one of the witnesses will be required to give evidence by affidavit that the will was duly executed by the testator if such clause is absent. Such clause might run—

“Signed by the above-named [testator] as his last will and testament in the presence of us (both being present at the same time), who in his presence and at his request have hereunto subscribed our names as witnesses.

“(Signed) J. JONES.
“T. SMITH.”

Or more simply thus—

“Signed by A. B. in our joint presence and by us in his presence.”

A witness cannot take any benefit under a will of which he is a witness, but except for the clause giving anything to a witness the will is good. An executor, therefore, who has anything given to him in the will, even for his services, will forfeit the interest if he is also a witness. He may act as executor.

Probate.—To complete the title of executor, the person taking the title must prove the will. To do this he must proceed in one of several ways, according to the circumstances of the case, and the completeness of

the will, and as has been stated it is safer that this should be done by a solicitor.

Common form.—If the will is perfect and contains an attestation clause, as above described, the executor may present the will to the Probate Division of the High Court, either in London or at the District Registry of the place where the testator died, together with evidence of the genuineness of the will. If, however, the attestation clause is wanting, then an affidavit of one of the witnesses to the effect that the Wills Act requirements were followed must be produced. The will so produced is deposited at Somerset House, and a copy of it is made sealed under seal of the court and issued to the executor. This probate copy, or as it is commonly called, "the probate," remains in the hands of the executor as his authority to act, because attached to it is the "probate piece" which certifies that he has proved the will and been appointed executor.

Solemn form.—A will may at the executor's option in any case be proved at once in solemn form, *i.e.* by summons of interested parties to appear in court and examination of witnesses before a judge. In case of dispute, any person interested may compel the executor to prove in solemn form, even though probate in common form has been granted. This procedure must be taken in the Divorce Division of the High Court.

Absence of will.—In the absence of a will general administration is, as stated, granted to some one with an interest in the distribution of the estate. The office of general administrator is equivalent to that of

executor, and lasts until the estate is wound up or the administrator dies, but the office of administrator does not descend to the representatives of an administrator.

Will without executors.—In case a will is made and no executors are appointed, or the executors if appointed fail from any reason to take up office, the person with the greatest interest under the will is granted letters of administration, with the will annexed, that is, he is bound to follow the provisions of the will in so far as they are legal. Such an administrator is said to be an *administrator cum testamento annexo*, an administrator with the will annexed.

If, however, the executor, dying after acting and leaving no executor for his own estate, has not wound up his testator's estate, then an *administrator de bonis non administratio* is appointed to administer the goods *not administered* by the executor. Such administrator is also necessarily one *cum testamento annexo*, as an executor indicates a will, but such administrator may be appointed to complete the work of a deceased administrator.

Limited administration.—Of course it is possible that administration may be granted for a time, or for a given purpose. If the sole executor or the last surviving executor is an infant, then his next friend or some one interested is appointed as *administrator durante minore aetate*. An *administrator durante absentia* is appointed during the absence of the sole executor or next-of-kin from England and an *administrator pendente lite* is appointed pending the determination of litigation as to probate or administration.

Shortly, therefore, the office of executor may be qualified in regard to—

(a) *Time*.—As fixing his duties to commence after a certain period or limited to a fixed term.

(b) *Place*.—Where the property is in different countries and different executors are appointed in each country.

(c) *Subject-matter*.—The appointment of different executors for various parts of the property.

(d) *Conditional*.—That the person appointed cannot act until he has given security.

Estate.—All the testator's or intestate's personal estate, and since the Land Transfer Act of 1897, all his real estate except copyhold, pass on his death to the executor or to the administrator, as the case may be. There is the one exception of an estate held by the testator with another as joint-tenant which on death passes to the survivor and not to the executor, unless the joint tenancy was a partnership or by way of trade, in which case the share of the deceased is administered like any other estate, following the maxim : *Fus accrescendi inter mercatores pro beneficio commercii locum non habet*.

Rights of action or choses in action survive to an executor if they arise out of contract ; but the rule, *Actio personalis*, etc., applies to rights of action for damages for tort, e.g. assault or trespass. This rule is modified by the Employers' Liability Act, 1880, and the Workmen's Compensation Acts, 1897-1900, and others.

WHAT AN EXECUTOR AND AN ADMINISTRATOR
MAY DO, MUST DO, AND THE RISKS RUN IN
ADMINISTRATION

Before proof.—Before proving a will the executor may do anything which he might do after : he may pay and collect debts, and assent to legacies, since his title is derived from the will and not its proof. An administrator, on the other hand, cannot interfere in the collection or distribution of an estate until letters of administration are granted to him, since he derives title from the grant only. If, however, he does meddle with the estate, the letters of administration will cover acts properly done for the benefit of the estate before the grant was made.

After proof or grant, an executor or administrator may do anything for the good of the estate which the deceased might do, provided that as an executor he follows the will, and as an administrator acts under the court's directions, if any. He can sell, pledge, mortgage, or let property, he may accept security for debts, or accept a composition. The act of one co-executor is the act of all, and a sale or receipt made or given by one is good against all ; but in legal proceedings or sale of real estate all must join. One of several executors is responsible for his own acts only, and his co-executors have no liability for his wrongful acts.

An inventory must be taken and an account rendered to the Inland Revenue Authorities of all the estate. An affidavit of the value must be made according to the form, and stamped so as to cover the estate duty provided under the Finance Act, 1894. This duty varies

from 1 per cent. on an amount of £100 to £500, to 8 per cent. on £1,000,000 or over.

Duties.—An executor must, with reasonable diligence, convert the estate into money if required ; he must get in all effects, and on no account allow money to remain on a weak or risky security, or he may have to answer for a breach of trust, and this is so, although the testator or intestate may have been satisfied with the security.

He must pay debts legally due in the following order :—

1. Funeral and testamentary expenses.
2. Debts to the Crown by way of record or bond.
3. Such debts as are payable by particular statutes, e.g. income tax, poor rate, etc.
4. Debts in the nature of registered judgments.
5. Any other debts.
6. Voluntary bonds.

But if the estate be insolvent it may be administered according to the Bankruptcy Acts, when all debts rank equally except preferential payments (*q.v.*).

After debts are paid then, under a will, legacies are paid. Legacies are of two chief kinds, general and specific, whilst a third kind, partaking of the nature of these two, is to be found in what are called Demonstrative Legacies.

A gift of £100 or a gold watch is a general legacy, provided no special fund is marked out for payment, and no special watch pointed out.

A gift of a certain gold watch, or the debt of £100 due to the testator from A. B., is a specific legacy, i.e. a specific portion of the estate is bequeathed.

A demonstrative legacy is a bequest of something

general in character, but which is to be paid out of a particular fund *specifically* set aside, e.g. £100 from my L. & N. W. Ry. stock.

If the estate is not sufficient to pay all legacies in full, the general legacies abate proportionately. If the specific thing is still the testator's property at his death specific legacies do not abate, but if the testator has parted with the thing in his life the legacy fails, and is said in law to be adeemed.

A demonstrative legacy is better than a specific legacy in that it does not fail if the specific fund is gone, i.e. if the L. & N. W. Ry. stock is sold, it is paid out of the general estate ; and, on the other hand, it is superior to a general legacy in that no abatement is made so long as the specific fund is in existence.

Although a legacy is by the will the property of the legatee, his title is not complete without the executor's assent, and similarly the devisee of land under the Land Transfer Act, 1897, requires assent to complete his title. Although the executor has all the estate vested in him, and his assent fully vests the estate in the devisee, yet the assent requires no stamp, as it is not a conveyance, but a certificate that the estate assented to is not required by the executor for payment of debts. Assent may be in writing, or by word, or implied.

No payment of legacies can be demanded within one year, which is the reasonable time allowed to an executor to ascertain the amount of debts, etc., and wind up his estate. This is called "the executor's year."

An administrator is bound to divide or distribute the

estate under the Statutes of Distribution to the next-of-kin, and under the Land Transfer Act, 1897, he must convey the real estate to the heir-at-law. It must be noted that an administrator *conveys* to the heir; executors may *either assent or convey* to the devisee.

Executors are not personally liable for contracts of their testator, but the estate, through the executor, is responsible for all contracts, except one for the personal services of the testator, which, as we have seen, is discharged by death or incapacitative illness (*see "Contracts"*). A promise of an executor to pay out of his own pocket is not enforceable unless in writing (Statute of Frauds, sect. 4), signed by the executor or his agent. Any other promise is construed as meaning that payment will be made out of the funds in hand along with other debts.

If an executor carries on business for winding-up purposes, and he buys goods or gives out work for that purpose, he is personally liable. He may, however, by special agreement with the creditors, limit his liability to the extent of the assets at his disposition. If he carries on business with or without the direction of the will, he is personally responsible to creditors, but in the former case he can recover money (properly expended) from the estate, and in the latter case he can recover so far as he is completing contracts, or preparing to sell the business as a going concern.

If the executor carries on the business at a loss, or waste the assets, he is guilty of a *devastavit* if there has been a breach of duty. Paying legacies before debts is a *devastavit*, as is any mismanagement of the estate, but no *devastavit* is committed if the executor

acts as a prudent man of business would in his own affairs.

Remuneration.—It is only just that, in return for the onerous duties and liabilities thrown upon him, the executor should have some little privilege for himself. He may take no pay for his acting in the office, nor may he make any profit out of it. Anything given by the will—*e.g.* payment to a solicitor for his services—is in the nature of a legacy, and is subject to all incidents of a legacy; *e.g.* if the estate is not sufficient to discharge all debts, he is not entitled to be paid.

An executor (and theoretically an administrator) has two rights: (1) the right of retainer, and (2) the right of preference. The administrator, however, engages by his bond to administer, “not, however, preferring his own debt,” in the course of administration, and so he loses his right.

1. Right of retainer is the right of the executor to retain out of what are called *legal assets* any sum of money due as a debt to him from the testator. “Legal assets” are practically all the property which, previous to the Land Transfer Act of 1897, came to the executor by virtue of his office. Real estate now comes to the executor under this Act by virtue of his office, but it has been held in *Holder v. Williams*, 1904, that it is not thereby legal assets out of which an executor can retain a debt. A simple contract debt cannot, however, be retained in preference to payment of a specialty debt to a third party, but a specialty debt of an executor may be retained as against a similar one due to a third party.

2. Right of preference is the right of an executor

to pay any creditor of equal degree in preference to another, subject to the rule as to creditors of equal degree under the head of "Right of Retainer."

When the administration of the estate is finally completed, a release should be obtained from the persons entitled to the residue. If, however, the executor has any difficulty in obtaining this, he may pay the funds into court as if he were a trustee, and so discharge himself, the official receipt being his evidence.

In taking accounts, he may charge only for costs of his solicitor and his personal expenses necessarily incurred in the administration, and he is not liable for rents and monies received by his co-executor, even though he has signed receipts for conformity, being in this respect unlike a trustee. He is, however, like a trustee liable for his co-executor's default if his own conduct has been such as to conduce to the default. He may be relieved from the consequences of a devastavit if he acted *bond fide*. After six years no action lies against him, as the charges for a devastavit are in the nature of a simple contract debt, unless the devastavit was wilful, or unless there has been fraud or retention, or wrongful conversion of the fund.

An executor or administrator can always get the advice and protection of the court in matters of difficulty, either by issuing an originating summons or a writ of summons. If he act on the directions of the court, he is not liable for loss which may accrue.

An originating summons is a process by which a matter is examined in chambers, and not in the open court. The questions or points in issue are tried before a judge in chambers, and expense and loss of time is

greatly curtailed. This method is adopted in all but complicated cases, when a writ of summons is used, and the matter decided in open court.

It must be noted that an executor must not appeal to the court without cause or reason, as he may have to answer out of his own pocket for expensive or needless litigation.

QUESTIONS

218. Distinguish between an executor and an administrator.
219. State in what order persons are granted letters of administration.
220. What is the effect of the death of an executor or an administrator?
221. State the essentials of a valid will.
222. What is meant by proving a will in common form and in solemn form?
223. State the procedure adopted when any executors are appointed under a will.
224. Give instances of limited administration.
225. Outline an executor's duties prior to proving the will.
226. State the order in which an executor should discharge debts.
227. Instance various kinds of legacies.
228. What is an executor's position should he carry on a business?
229. Explain the right of retainer and the right of preference.

CHAPTER XXII

ARBITRATION

Definition—Capacity—Submission—Voluntary and Compulsory Reference—Performance of Submission—The Arbitrator—The Umpire—Proceedings—The Award—Certainty—Special Case—Publication—Reference back—Setting aside—Enforcing Award—Costs.

Introduction and definition.—Arbitration is of more ancient origin than an action in a court of law. In our early law arbitration was the mode of settling disputes and differences between parties, and the early judges of the common pleas were nothing more nor less than arbitrators.

A reference to arbitration is, as a general rule, accomplished by agreement between two parties, who are willing that matters in dispute between them shall be settled by a referee or arbitrator. An analysis of this definition shows that some matter must be in dispute. It is not the fixing of a value to a matter which one party has agreed to purchase, sell, pay for, etc., but it is an agreement that the parties shall submit to a full examination, in the nature of a legal inquiry, in which each party's case is heard and a decision or award given on the merits of the case. From this it will be appreciated that a valuation and an arbitration differ in a very

material point. In fact, valuations do not come within the Arbitration Act, 1889, which is the last and most important piece of legislation on arbitration.

Capacity.—The agreement to refer to arbitration is called a “submission,” and the persons who can be parties to a submission are governed by the general law of contract. Infants are not bound by a submission, a bankrupt cannot refer matters touching the estate, although the trustee may with the consent of the committee of inspection. Agents with a full authority to submit to arbitration disputes arising with customers, may do so, but not otherwise. Hence a partner, without express or implied authority, cannot bind his co-partners by a submission to arbitration.

Subjects for reference or otherwise.—Any civil matter may be the subject of a reference to arbitration, that is, any subject which could be tried in a civil court. This will include any future differences which may arise between the parties. Criminal matters, being wrongs against the public, and not against the individual, may not be subject of a reference, nor may divorce proceedings as distinguished from proceedings for arrangement of a separation.

Submission.—The Arbitration Act, 1889, defines a “submission” as a *written* agreement to submit present or future differences to arbitration, whether or not an arbitrator is named in such agreement. The submission is not, however, a complete contract, but with the *award* will form one. In other words, some terms of the contract are left to the arbitrator. If the submission be an agreement by deed, the contract is a specialty one, and stamp duty of 10s. will be payable ; otherwise, for

matters of over £5 in value only, a sixpenny stamp is required.

Agreement and compulsion.—Submission may arise out of an agreement, either verbal or in writing, or by deed, but as we have seen, writing is necessary before the Act of 1889 applies. The agreement may arise before any dispute occurs, or it may be the outcome of litigation, where all parties before the court agree to such a method of settlement; but, on the other hand, it may be compulsory by an order of the court, as in long, technical disputes not of a kind to be settled by a judge and jury, or in questions of account which are decided by official referees or special arbitrators.

Statutes.—Under special statutes arbitration is provided for, the chief being the Lands Clauses Consolidation Act, 1845, which provides for the settlement in this way of the consideration to be paid to parties for land taken for the erection of public works, or the carrying out of public undertakings.

Provisions implied in a submission.—If the parties do not provide for any special mode of reference, one arbitrator will consider the question; but if the submission provides for two arbitrators, these two may appoint an umpire at any time during the period over which their powers extend, but usually before entering on the inquiry. The award is made within three months of entering on the reference; it is to be in writing, but the arbitrators may extend the time by written notice to which they append their signatures. If they do not make the award or extend the time, the umpire may take up the reference in place of the arbitrators, and he

has one month, from the time appointed for the award of the arbitrators, in which to make an "umpirage."

It is further understood that parties who submit to an examination by arbitrators shall "make discovery" of books, documents, deeds, or writings required in settlement as if the matter were an action in the High Court; they must produce witnesses who may be examined on oath or affirmation, and finally any award is binding on all parties.

Specific performance of submission.—A person who has entered into an agreement to refer to arbitration any matter in dispute, may still bring an action on the matter, either in the County Court or the High Court, as the case may require. But if the other party, before taking any step in such action, makes application to the court to stay the action, then, if it be clear that the submission has been entered into, the court will make an order to stay the proceedings. There is nothing which compels the performance of an agreement to refer to arbitration, *i.e.* the discretion of the court in any specific instance will be exercised.

Revocation of submission.—As in other agreements a revocation of a submission is not possible, and an action lies, against a party revoking, for breach of agreement in case of an oral submission or breach of covenant in a deed. By an application to the court (by summons to a judge in chambers) revocation may be granted in particular cases, exercise of which power is discretionary and dependent on the circumstances of each particular case. It may be pointed out that an arbitrator's authority cannot be revoked by the parties even in cases of mistake, unless with leave of the court. Submission

will be revoked by leave in case of the bankruptcy of a party, corruption or bias of the arbitrator, or any misbehaviour on the arbitrator's part. If, however, bias or interest of the arbitrator is known to the parties at the appointment, no revocation takes place, and an agreement to ignore an arbitrator's conduct is good.

Bar to an action.—An agreement to submit to arbitration is no bar to an action, unless such agreement provides that no action can arise until an award has been made; *e.g.* in an insurance policy on which no action can arise until the loss has been fixed by arbitration. In a few cases where statutory provision exists, the jurisdiction of a court is ousted.

The arbitrator.—As to who is the most suitable person to act as arbitrator, the best rule is perhaps to appoint the man who can best weigh and appreciate the points at issue, whether that man be a business man of little legal experience or a lawyer. The appointment should be (for clearness) in writing, but this is not compulsory except where special mode of appointment is required by statute.

Umpire.—The appointment of an umpire or "third arbitrator"¹ of the Arbitration Act, 1889, has been dealt with, and it may be noted that in case of disagreement this party is appointed by the court on application. In case of an umpire under the Lands Clauses Consolidation Act, after seven days' default of the arbitrators to appoint, the Board of Trade makes the appointment.

Appointment.—An arbitrator is appointed by the court if the parties disagree, if a vacancy occurs and the

¹ Term also applied to one of three arbitrators who sits with the others and not as umpire.

parties fail to fill it, or, as in the above cases, of appointment of an umpire. If one party fails to appoint an arbitrator, each party being by the submission empowered to appoint one, then the party appointing his arbitrator may serve notice (seven days) on the other party to make his appointment. If he fail, then, subject to revision of the court, the arbitrator already appointed may be made *sole arbitrator*, his award being binding on both parties.

An umpire rehearses the whole case, unless he sits with the arbitrators; and, like the arbitrators, he may by writing, signed by himself, extend the time for making his award.

Proceedings.—Proceedings in an arbitration generally approximate closely to proceedings at law. The submission takes the place of a writ, and the points at issue may be required in writing from the parties. These are similar to the statements of claim and defence, and form the arbitrator's basis of procedure. If the parties fail on this point, the arbitrator himself puts into writing the points which he believes to be at issue.

The law of evidence, as applicable to the courts, applies to an arbitration, and mistake in this may give rise to application for leave to revoke the submission, although in default of such application an award will not be invalid, even though evidence has been improperly rejected or tendered. The arbitrator is not otherwise a slave of practice, he may refuse a hearing to advocates or counsel, but he must hear the parties and their witnesses. An expert, however, may, if arbitrating in that capacity, refuse to hear evidence.

Ex parte proceedings.—An arbitrator cannot proceed in the absence of the parties, i.e. *ex parte*, except in very special cases ; and the arbitrator is bound to give notice of his intention in such cases, which arise when the party refuses to attend, or by keeping back evidence, tends to delay the award.

Legal adviser.—A lay arbitrator may generally have a legal adviser to sit with him ; he can consult experts in any case of difficulty, but he must not bind himself to follow their advice ; he must treat it as evidence and give his decision on the merits of the case, as he is not allowed to delegate his authority.

THE AWARD

The decision of the arbitrator or arbitrators is called an award. It must be in writing, but no technical language is as a rule necessary. All that is required is that the award must clearly and certainly show what the decision is. In order that it may be certified as the joint opinion or judgment of the arbitrators, it must be signed by each in the presence of the others, the signatures being appended at the same time. Any clerical error can be rectified by the arbitrators, who are not now by the award deprived of further power, unless the submission so provides.

Certainty of the award.—The award must be certain or it will be void, but the courts will endeavour to construe any award as certain on the principle that "that is certain" which can be reduced to a certainty. A direction to pay money is certain, even though no time of payment be fixed ; but a direction to pay all

debts without stating the amount is void for uncertainty. An alternative award will be good, as the parties are bound to do one thing; but any direction must be specific, and not such as may tend to a future dispute.

Special case.—At the direction of the court, the arbitrator may be required to give his award in the form of a stated case; and the arbitrator, on his own initiative, may in any event state a special case, either on making the award or on any point of law during the proceedings.

Stamps.—The award must be stamped according to the provisions of the Stamp Act, 1891, or the courts will not enforce it.

Extent of award.—An award is void so far as anything not included in the submission goes, but not further; but, of course, this does not deter the arbitrator going into outside matters with a view to more clearly understand the points at issue. If an express power is exceeded the award will be bad, and if any point in dispute is omitted the whole award is bad, unless the claim is of such nature that an affirmation is not required, in which case silence is equivalent to a decision on the point.

What an award may be.—Should the arbitrator find that money is due from one party, his award should direct payment of the sum. He has power to order payment at a certain time and place, or by instalments, or the time may be future, and if he orders a bond to secure payment he must do so without ordering sureties. If the claims are several and distinct, the arbitrator may nevertheless order the payment of an aggregate sum in satisfaction of all claims.

As to land.—When the question relates to land and the award is a partition between joint tenants or a direction for the transfer of the land, the award will not by itself operate to effect the transfer. In order that the award may be enforced, the arbitrator should direct the parties to execute conveyances, unless the question comes under the Enclosure Act, 1801, or the Artisans' Dwellings Act, 1875, when the award itself effects the transfer.

Partnership.—When an arbitrator is appointed to arbitrate on all matters of difference between partners, he may grant a dissolution, return of a premium, or may apportion assets between the partners ; but he may not appoint a receiver, nor direct payment to himself of any money to satisfy any debt.

Publication.—The award is invalid until it is published. It is published immediately on its execution, and then becomes valid even if not yet delivered to the parties ; but if delivery is one of the terms of a submission, the award will only be complete on delivery.

An award must be final and unconditional, and not dependent on the voluntary act of any party ; it must be legal and possible at the time of the making.

Reference back.—The court or a judge may remit any matter referred to the arbitrator for reconsideration ; e.g. instead of setting aside an award, the court will, on an application, remit the award to have errors corrected. The arbitrator's powers are revived, and his award will generally be an entirely new one.

An award made on a compulsory reference may be appealed against on an error in law, and the court may set aside the award or remit it for reconsideration.

Setting aside.—An application may be made to the court to set aside an award, by motion to the court with two clear days' notice to the parties. Motion must be made before the end of the sittings next following the publication of the award. An award will be set aside in the following cases: (1) When it is bad altogether; (2) when the proceedings are irregular; (3) where the arbitrator has been guilty of misconduct; (4) when evidence has been withheld; (5) when evidence has been improperly rejected.

Enforcing the awards.—An award on a submission by consent, as distinguished from a compulsory reference, is enforced by leave of the court or a judge, in the same way as a legal judgment or order of the court. Application is made to a Master in Chambers by an originating summons. The applicant must produce a duplicate of the award (or the original) together with a copy, each being verified by affidavit. The order is then made or refused, and execution may be levied on such order. If the submission is not in writing the Arbitration Act, 1889, does not apply, and the above way of enforcing is impossible. The procedure then is, to bring an action on a money claim, in which action any objection to the award must be raised. References by the court may be enforced by writ of execution, or by an action for specific performance. Specific performance of an award is only granted where damages for non-compliance with the terms of an award are insufficient.

Costs.—Under the Arbitration Act, 1889, costs are at the discretion of the arbitrator, unless definitely excluded in the submission. The arbitrator is judge

of the remuneration due to him, and all costs not embodied in the award are liable to taxation. It is not, however, usual to state the remuneration in the award, but the arbitrator directs payment of costs by the party liable without naming any sum. He then notifies to the party the amount of his charges, and exercises a lien on the submission and award to secure payment.

Costs are of two classes—costs of the reference, including expenses incurred in the inquiry, stated cases, or legal advice; and costs of the award, being the arbitrator's and umpire's charges.

QUESTIONS

230. Define and discuss the meaning of "arbitration."
231. What is meant by submission? Give instances of persons not bound by it.
232. What is the position of a trustee in bankruptcy, and also of a partner in regard to a submission?
233. Are there any persons who are not competent (*a*) to submit matters to arbitration, (*b*) to fill the office of arbitrator?
234. State matters that may and may not be subjects for reference.
235. State under what circumstances a submission may be compulsory.
236. Can a submission to arbitration be revocated? If so, in what manner and on what grounds?
237. Mention the implied provisions in a submission.
238. Under what circumstances may the revocation of a submission take place?
239. How is an arbitrator appointed?
240. What is an umpire? How is he appointed?
241. State the essentials of an award.
242. What is meant by saying that an award must be certain?
243. In what cases has the Court power to appoint an arbitrator?

244. Set forth the arbitrator's powers in regard to an award of money.
245. What award may be made in partnership differences?
246. What is the duty of an arbitrator in deciding points as to the admissibility of evidence?
247. Under what circumstances may an award be set aside?
248. Point out the manner in which an award may be enforced.
249. Should one of the parties to an arbitration be dissatisfied with the decision of the arbitrator, what steps can be taken to get the award set aside? On what grounds can such steps be taken?
250. How is the remuneration of an arbitrator fixed?

LEGAL PHRASES AND MAXIMS

Actio personalis moritur cum persona. "A personal action dies with the person."

Cestui que trust. The person for whom trust funds are held.

Cestui que vie. A person may hold property during the life of another; the latter is the *cestui que vie*.

Caveat emptor. "Let the buyer beware." The law implies no general warranty as to the quality of goods, and the risk, except in exceptional cases described under "Sale of Goods," lies with the buyer.

Debita sequuntur personam debitoris. "Debts follow a debtor wherever he goes."

Delegatus non potest delegare. "An agent cannot delegate his authority," i.e. an agent cannot appoint another person as sub-agent to carry out his duties, without his principal's consent.

Ex nudo pacto non oritur actio. "Out of a bare agreement no action can arise." Therefore, consideration is required in every contract, unless the contract be by deed, and even in that case the consideration must be legal and moral, for *Ex dolo malo non oritur actio*, and *Ex turpi causa non oritur actio*, respectively mean that no action can be based on fraudulent or immoral considerations.

Jus accrescendi inter mercatores locum non habet, pro beneficio commercii. "For the benefit of commerce the right of survivorship does not exist between merchants." In English law joint tenants have what is called right of survivorship, that is, on the death of one, his share in the property is taken over by the rest, and does not pass to the deceased tenant's representatives. The maxim implies that the right of survivorship has no existence in commercial circles, this being more for the benefit of commerce than otherwise. Hence in partnership a partner's share does not go to the surviving partner on the partner's decease, *i.e.* partners are not joint tenants.

Mobilia sequuntur personam. "Movables follow the person" (*see "Conflict of Laws"*).

Nemo dat quod non habet. "No one can give that which he has not." In sale of goods a party not the owner gives no title, except the sale be in market overt.

Nemo plus juris in alium transferre potest quam ipse habet. "No one can confer to another a better right than he has." This is similar to the last one. Both are subject to the exception of negotiable instruments, which can be transferred to a holder in due course free from equities, notwithstanding the want of the transferor's title.

Qui facit per alium facit per se. "He who acts through another acts through himself." This refers to the liability of a principal for his agent's acts. Similar in effect is the maxim—

Respondeat superior. "Let the principal answer."

Simplex commendatio non obligat and *Falsa demonstratio non nocet* are both well-known maxims. The

former means "a simple commendation is not binding," and, therefore, a simple recommendation or puff of articles which a person is selling does not bind him as would a statement of a fact. The latter means "a false description does not vitiate," but the false description must not be of such a kind as to amount to fraud. All these maxims may be usefully considered along with the chapter on "Contracts."

EXAMINATION PAPERS

INSTITUTE OF BANKERS

Preliminary, 1904

1. WHAT are the rights of a holder of a bill who has a lien on it by implication of law?
2. What is meant by signature by procuration on a bill, and what is its effect?
3. A bill is accepted payable at 1, Duke St. On the holder going to 1, Duke St., to present for payment, he finds the house shut up. Is this sufficient presentment?
4. The holder of a bill payable to his order transfers it for value without endorsing it. What are the rights of the transferee?
5. The drawee of a bill accepts it "payable at L. & Co. Bk., Strand." Is this a qualified acceptance?

Preliminary, 1905

1. How may a blank indorsement be converted into a special one, without incurring the liabilities of an indorser?
2. A bill issued out of the United Kingdom is not stamped in accordance with the law of the place of issue. Does this render it invalid in this country?
3. The acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him. At maturity that part is in the hands of a holder in due course. Is the acceptor liable to him?
4. In what cases must a bill be presented for acceptance?
5. A man in London draws a cheque on a piece of paper and fixes an adhesive penny stamp on it, but does not cancel it. Is he liable to any, and if so, what penalty?

6. An inland bill is endorsed in France. According to what law is the endorsement interpreted as regards the acceptor?
7. What is meant by partial indorsement of a bill, and has it any, if so what, effects?
8. Define and illustrate the term "restrictive indorsement."
9. How may a lost bill be protested.
10. Can notice of dishonour be waived after omission to give due notice?

June, 1906

1. Explain the "not negotiable crossing."
2. Distinguish between the position of a transferor by indorsement, and a transferor by delivery of a bill.
3. What is payment of a bill in due course?
4. Are any, and, if so, what, documents bills of exchange within the Stamp Act, 1891, which are not so under the Bills of Exchange Act, 1882?
5. When is a bill of exchange payable on demand deemed to be overdue?
6. What is the effect of payment in due course of an accommodation bill by the party accommodated?
7. What is the effect of not presenting a cheque within a reasonable time of its issue?
8. Is a receipt stamp required when the payee of an order cheque for over £2 on receiving payment writes his name on the back? If not, why not?
9. What is the legal position of the holder of a cheque which is refused payment on presentation?
10. Distinguish between a "holder" and a "holder in due course."

CHARTERED INSTITUTE OF SECRETARIES

I. INTERMEDIATE, F. FINAL QUESTIONS

June, 1904

- I. 1. Distinguish between guarantee and a promise to pay for goods supplied to a third person.

I. 2. In what circumstances is the pledgee of a bill of lading liable to pay the freight?

I. 3. Explain the effect of the "not negotiable" crossing on a cheque.

I. 4. A servant of a person engaged in business is by agreement remunerated by a share of the profits of such business: does he thereby become a partner?

I. 5. F. A man is employed as a broker to buy goods: can he fulfil his employment by selling his own goods to his principal?

I. 6. F. Define an insurable interest with regard to life assurance, and give examples.

I. 7. F. A person makes a representation of fact which is untrue in fact, and is made recklessly, he having no knowledge on the subject, and not taking trouble to ascertain whether it is true or false. Is he liable to the person to whom he makes it, and who acts upon it to his loss?

I. 8. F. What is the law with regard to assignment of contracts involving personal confidence and ability?

I. 9. F. What is the position of a non-trading corporation with regard to the issue of negotiable instruments?

I. 10. F. To what extent is a shipowner's liability for goods carried by him, limited by the Merchant Shipping Act, 1894?

I. 11. F. State the effect of the Gaming Act, 1892, upon speculative dealings in differences.

I. 12. F. What is the effect of entering judgment against one of two joint debtors?

I. 13. F. The last day of grace on a bill falls on a day appointed by Royal proclamation as a public thanksgiving day. When is the bill payable?

I. 14. F. Is there any, and, if so, what, protection for a bank paying on a forged indorsement, a draft drawn by a branch on the head office, payable to order on demand?

December, 1904

I. 1. Distinguish between the contract of pledge and a lien.

I. 2. In what cases can a continuing guarantee be revoked by notice?

I. 3. Define good faith as requisite for an indefeasible title to a negotiable instrument.

I. 4. In absence of agreement that he shall do so, can the buyer of goods be compelled to take delivery by instalments?

I. 5. F. A bill is drawn for £100 payable six months after date with interest. What stamp is required?

I. 6. F. Where a buyer is entitled to reject goods, is he bound to return them to the seller, or what other course may he pursue?

I. 7. F. What are the necessary elements of an acknowledgement to take a debt out of the operation of the Statutes of Limitation?

I. 8. F. Is it a valid objection to the negotiability of an instrument, that the custom of the mercantile world to treat it as negotiable is of comparatively recent date?

I. 9. F. What is meant by a contract *uberrima fidei*? Give instances.

I. 10. F. A. issues advertisements warning the public not to purchase an article sold by B., on the ground that it is an infringement of a patent vested in A., and threatening legal proceedings against any one doing so. Has B. any, if so what, remedy?

I. 11. F. What is the law as to secret commissions received by an agent?

I. 12. F. A bill of exchange is accepted when over-due. When is it payable?

I. 13. F. Goods are tendered by a railway company to the consignee, who refuses to take them. What is the position and duty of the company?

I. 14. F. Negligence cannot exist without a duty. Comment on this statement and give examples.

June, 1905

I. 1. What is a warranty?

I. 2. An agreement is not properly stamped: what is the position of the party seeking to enforce it?

I. 3. How is a contract under seal made? What contracts must be under seal?

I. 4. Distinguish between negotiability and assignability.

I. 5. F. Define a bill of lading. Is it negotiable?

I. 6. F. A cheque is drawn with the amount in words differing from the amount in figures. What are the rights of the holder?

I. 7. F. What is stoppage *in transitu*? When does the right exist and how is it exercised?

I. 8. F. Define consideration. Is consideration always necessary for the validity of a contract?

I. 9. F. What is the position of an agent who enters into a contract without disclosing the existence of his principal?

I. 10. F. A married woman enters into a contract : what are her rights and liabilities?

II. F. What are the rights of a surety when he pays the debt?

12. F. Define misrepresentation. What are the rights of a party who has been induced to enter into a contract by misrepresentation?

13. F. Distinguish between possession of, and property in, goods. In a sale of specified goods, when does the property pass to the purchaser?

14. F. A bill of exchange is dishonoured : when must notice of dishonour be given and to whom?

December, 1905

I. 1. What contracts are required to be in writing?

I. 2. What is a wager? Is a wager always void?

I. 3. When is a creditor entitled to charge interest on the debt due?

I. 4. What is the effect of the Statute of Limitations with regard to simple contracts?

I. 5. F. To what extent and under what conditions are contracts assignable?

I. 6. F. Goods obtained under a hire-purchase agreement are sold by auction. What remedy has the person who supplied the goods against (*a*) the hirer, and (*b*) the auctioneer?

I. 7. F. A party to a contract becomes bankrupt. What is the effect on the contract?

I. 8. F. Distinguish between lien, mortgage, and pledge. What are the principal cases in which a lien arises?

I. 9. F. M. owes N. £80 and pays him £40 in cash; N. gives M. a receipt for £80. What is the position of M. and N. with regard to the balance of the debt?

I. 10. F. You receive a cheque in payment of a debt and

while in your possession it is lost or destroyed. What are your rights?

11. F. What is the implied authority of a mercantile agent having possession of the goods? Are the circumstances under which the goods came into his possession ever material?

12. F. What rights does the purchaser of the goodwill of a business secure?

13. F. What is general average? How is the amount to be contributed calculated?

14. F. Under what circumstances will foreign rules of law be applied to contracts by the English courts?

INCORPORATED ACCOUNTANTS

June, 1903

1. Explain the terms : lay days, replevin, dock warrant, domicile, *cestui que trust*, *cestui que vie*, material men, equity of redemption.

2. State the particular rules which govern offer and acceptance so as to constitute a binding contract between the person making the offer and the person to whom the offer is made.

3. How far (if at all) are contracts by way of wagering and gaming valid at common law? State shortly the effect of the various statutory provisions on the subject.

4. Distinguish between a factor and a broker. Explain carefully what statutory authority is possessed by factors.

5. Define bailment. State generally the different degrees of responsibility to which bailees are subject. How have the liabilities of innkeepers been modified by statute?

6. If you went to Shylock's office at the West End and borrowed £100, would Shylock be entitled to interest thereon, if nothing was said about interest? When is interest payable on money due under a contract?

7. What is the meaning of the term "negotiable"? Distinguish "negotiability" from "assignability." How is a bill negotiated?

8. What do you understand by the acceptance of a bill for honour? What is the effect of such an acceptance?

9. Point out the difference between "bottomry" and "respondentia." What are the requisite conditions for a valid bottomry bond?

10. Give a concise explanation of the right of stoppage *in transitu*. When and how can it be exercised?

December, 1905

1. Explain the expressions, guarantee ; indemnity ; F. O. B. ; C. I. F. ; foreclosure ; liberty to surcharge ; salvage ; catching bargains with heirs.

2. Point out the difference between a simple contract and a speciality contract. Are simple contracts ever binding if not in writing? Are simple contracts always binding if in writing?

3. How far, if at all, are contracts of (a) infants, (b) married women, binding?

4. In a contract of sale, what are the rules governing the question as to when the property in the goods sold passes from the seller to the buyer?

5. How do you define a common carrier? What are his liabilities at common law? How have the liabilities of a carrier by land been affected by statute?

6. What are the rights of a surety against—(1) the debtor; (2) the creditor; (3) a co-surety?

7. On what grounds will a surety be held discharged?

8. What would be grounds for dismissing a servant without notice? Snip, while in the service of Broadcloth, a tailor, copied from his master's order-book the names and addresses of Broadcloth's customers. Shortly afterwards Snip set up as a tailor in business on his own account, and is found by Broadcloth to be using this list for the purpose of soliciting orders. Has Broadcloth any remedy? Give reasons for your answer.

9. State generally what you know of the law relating to crossed cheques.

10. What are the rules of law which govern the recovery of money paid under a mistake? A cheque is made payable to your order; you endorse it and present it to the bank for payment; the cashier of the bank, not knowing the drawer's account is overdrawn, pays you the amount of the cheque. Can the bank sue and recover from you the amount so paid? Give reasons for your answer.

CHARTERED ACCOUNTANTS

June, 1906

1. Define a bailment. How far is a railway company liable for the safety of a passenger's personal luggage?

2. A married woman orders goods from her milliner. By what authority, and to what extent, is she liable for the price of the goods, apart from any question of her husband's liability?

3. A received an order for goods which, if delivered on a certain day, would entitle him to an extraordinary price. He gave notice to the carriers—a railway company—that the goods would be thrown on his hands if not delivered on that day, but he did not inform them that there was anything exceptional in the nature of the contract. What will be the measure of damages to which A. is entitled on the railway company failing to deliver the goods in due time? Give reasons.

4. A. and B. are in partnership as solicitors. X., a client, hands to A. £1000 for investment on the mortgage of a freehold house, and a further sum of £500 to invest at his own discretion. A. absconds with both sums of money. Is B., who is entirely ignorant of the transaction, liable to X. for his loss or any part of it? Give reasons.

5. A bill of exchange, drawn by an infant and duly accepted, is negotiated by the infant who obtains the proceeds.

(a) On the bill maturing, is the infant liable upon it to a holder in due course.

(b) Can the infant confer a good title upon the indorsee?

6. What is the effect of altering a bill of exchange in a material part? Mention some alterations which are deemed to be material.

7. Define "general average." On whom does the liability contribute to a general average loss fall?

8. In what events, and to what extent, is the liability of ship-owners limited in respect of loss of life or personal injury to passengers, and loss of or damage to goods?

9. Does the common practice of inserting in articles of partnership, contracts for works, insurance policies, and other instruments, clauses providing that differences or disputes thereafter arising between the parties should be referred to arbitration deprive the courts of jurisdiction over the matters to be referred?

10. Where a submission to arbitration provides that the reference shall be to two arbitrators, one to be appointed by each party, and one of the parties neglects or refuses to appoint an arbitrator, what course is open to the other party?

SOCIETY OF ARTS

1. Explain briefly and distinguish the terms "simple contract," "conveyance," "void contract," "voidable contract."
2. How can an offer not under seal be revoked?
3. A. offers to sell to B. a picture for 1000 guineas. B. offers £1000, which A. refuses. B. then says that he accepts A.'s offer to sell for 1000 guineas, but A. refuses to part with the picture. Discuss B.'s position.
4. How can the benefit of a contract be assigned? Distinguish between the assignability of a contract and the negotiability of a bill of exchange.
5. What are the rights or liabilities of an indorser of a promissory note as to (1) prior indorsees, (2) subsequent indorsees?
6. What is the relationship between a banker and his customer, and how is the banker's authority to honour the customer's cheques determinable?
7. How has the extent of the liability of carriers by land or by sea been affected by statute?
8. What warranty of seaworthiness is there where a ship is chartered for a voyage to carry goods?
9. What is the effect of the signature of a bill of lading by the master (1) as against himself; (2) as against the shipowner; (3) where the shipper is also the charterer?
10. State briefly the cases in which a good title to goods can be given by a vendor who is not the true owner.
11. In fulfilment of a contract of sale of 100 pairs of boots, the vendor delivered to the purchaser 150 pairs of boots of the quality sold: what may the purchaser do?
12. What are the remedies of an unpaid vendor of goods (1) where the property has not passed to the buyer and the goods are in the vendor's possession; (2) where the property has passed to the buyer?

13. Discuss the liability of a principal for the fraud of his agent.
14. A. purports to contract, as agent for a named principal B., with C. A. had no authority and B. has not ratified. Is A. liable on the contract ; and what are C.'s remedies where A. honestly believed he had authority ?
15. A. employs a broker B. to buy tea for him in the market. B., following the custom of the trade, appropriates to A.'s order tea which B. had already bought in the market. Can A. refuse to accept the tea so appropriated ?

THE LONDON CHAMBER OF COMMERCE

(INCORPORATED)

Examination for Senior Commercial Certificates, 1906

1. Can A. ever sue under a contract entered into between B. and C., and if so when ?
2. Under what circumstances, and on what conditions, can interest be recovered on a contract ?
3. D. agrees with E. to send him goods "on sale or return." D. sends the goods to E. When does the property in the goods pass to E. ?
4. Distinguish between the memorandum of association and the articles of association of a company incorporated under the Companies Acts. Show how the contractual capacity of such a company is affected by the Memorandum of Association.
5. What risk is there in taking a bill or note after it has become due ? Does the same rule apply to cheques ?
6. How may a partnership be dissolved ?
7. May an agent ever, and if so when, delegate his authority ?
8. A ship is chartered to carry a cargo of silk from China to London, freight payable on delivery. On the voyage sea-water gets into the holds (by reason of something which is not an excepted peril) and damages the silk. The shipowner refuses to deliver except on payment of the whole of the freight. The charterer tenders the freight, less the amount of the damage. Is the shipowner bound to deliver ? Can he sell the cargo and retain the amount of the freight out of the proceeds ?

9. What is the effect of adjudication in bankruptcy on the capacity of a person to acquire and dispose of property?

10. Where there is an agreement to refer disputes to arbitration under the Arbitration Act, 1889, and one of the parties refuses to nominate an arbitrator within the time required by the Act, what course ought the other party to pursue?

11. What is a negotiable instrument? Do all or any, and if so which, of the following documents come within that description : (a) a bill of lading, (b) a Bank of England note, (c) a crossed cheque payable to bearer?

12. What is meant by noting a bill of exchange? Has it any legal consequence?

13. How may a surety be discharged from his contract of suretyship?

14. Is a partnership recognized by the English law as a legal *persona*? Can an action be brought by or against the partners in the firm name?

***LANCASHIRE AND CHESHIRE UNION OF
INSTITUTES***

SECTION I.—PARTNERSHIP

1. How is a partnership formed? A. becomes a partner on condition that he is to have no share in the profits. Is such an arrangement binding?

2. How may a partnership be dissolved? What are the effects of a dissolution? Can a partner relieve himself from obligations entered into *before* his retirement?

3. Do the acts of individual partners in the course of business bind—

(a) The partnership firm?

(b) The private means of all the separate partners?

4. A ship agent at Manchester entered into an arrangement with a ship agent at Liverpool for mutual benefit. The Manchester agent was to urge business with the Liverpool agent, and the Liverpool agent was to promote the business interests of the Manchester agent. The profits of the two businesses were to be shared. It was provided by the agreement that neither of the

partners should be answerable for the acts or losses of the other. In carrying on business the Liverpool man incurred liabilities which he was unable to meet. Could the Manchester man be successfully sued as a partner? State the real tests of partnership liability.

SECTION II.—BANKRUPTCY LAW

5. What is meant by an act of bankruptcy? Mention any acts of bankruptcy. Can a company be made bankrupt?
6. What are the chief duties of—
 - (a) The Official Receiver?
 - (b) The Trustee?
 - (c) The Committee of Inspection?
7. How does a bankrupt get his discharge? Can a bankrupt who has obtained his discharge make a binding promise to pay debts from which the bankruptcy has released him?
8. On bankruptcy of a shareholder in a company can the trustee repudiate the shares if there is liability? In this case can the company prove in the bankruptcy of the shareholders for calls?

SECTION III.—PAWN, MORTGAGE, LIEN, SHIPPING

9. Does the contract of pawn immediately pass the property in the chattel to the pawnbroker? If in spite of due diligence the chattel is lost while in the pawnbroker's hands may the pawnbroker still sue the pawnor for the amount of his debt?
10. Interest on a mortgage being in arrear the mortgagor gave notice to the tenant of the mortgaged property. Was the mortgagee entitled to unpaid rent which had accrued before the notice was given?
11. A. stays at an hotel and refuses to pay the reckoning. What are the landlord's rights as to the luggage and belongings of A.?
12. Mention the usual contracts for the carriage of goods in ships. Has the shipowner a lien for freight?

SECTION IV.—COMPANY LAW

13. Explain the following terms : Statutory meetings. Debentures. Dividend. Prospectus. Director.

- any 25
14. How may a company be (a) Formed? (b) Wound up?
15. Contrast a partnership with a limited company.
16. At an auction on February 1, A. bought from B. a number of shares. By the conditions of sale the transfer was to be completed on February 14. On February 10, dividends were declared. On the 14th the purchase was completed. To whom would the dividends belong, A. or B.? State the reasons for your opinion.

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Q.W.E.J.
9/30/07

PRINTED BY
WILLIAM CLOWES AND SONS, LIMITED,
LONDON AND BECCLES.

